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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

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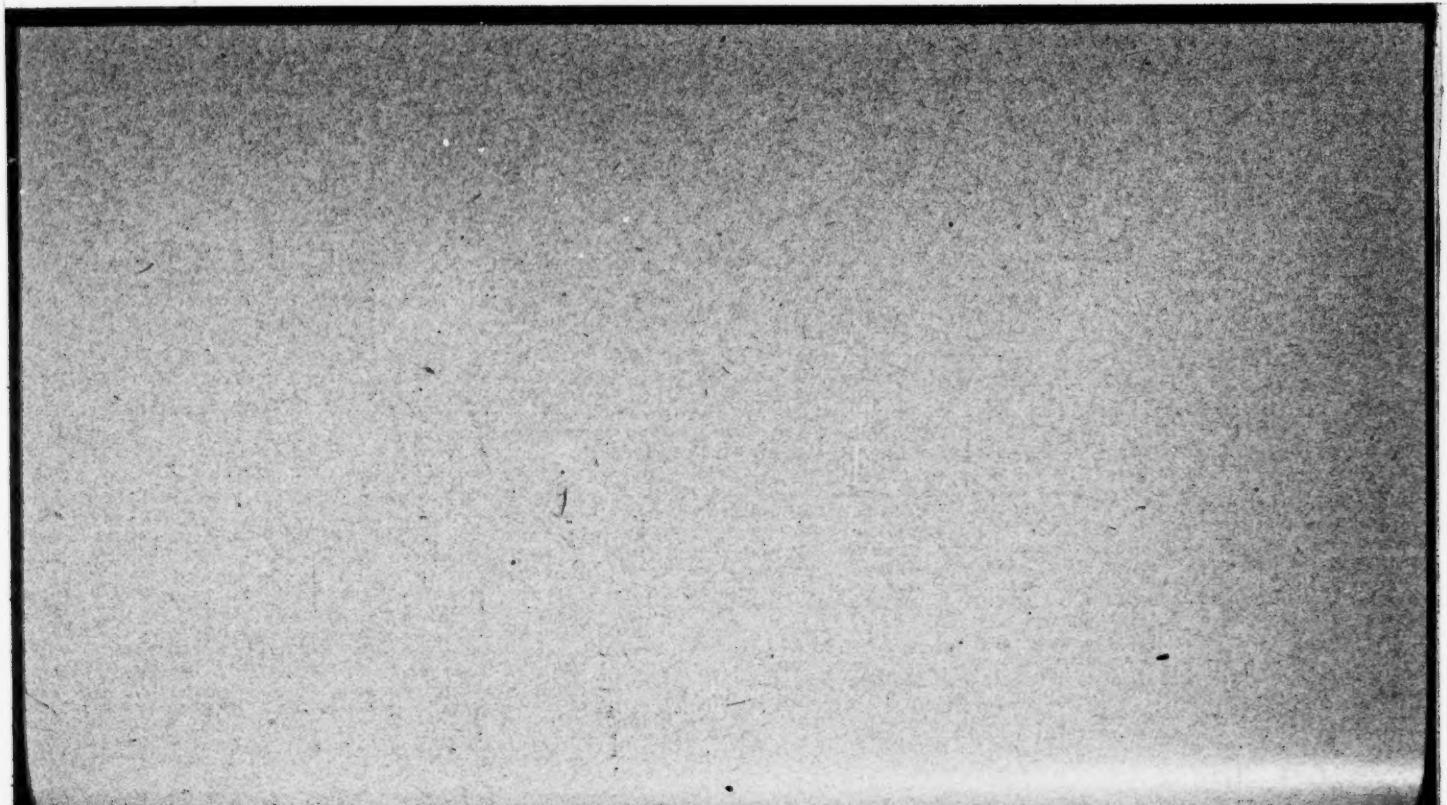

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THOMAS M. FIELDS,
Plaintiff in Error,
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No. 395.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

JURISDICTION IN ERROR.

In reply to the motion of the defendant in error to dismiss this case for want of jurisdiction, we respectfully submit the following:

(1) The matter in dispute in this case is whether the plaintiff in error, as a chancery receiver, is subject to a prosecution ending in a sentence depriving him of and operating to "forfeit all right or claim to any commissions, costs, and charges" on the receivership fund, which commissions, etc., amounting to $10,070.82, had been fully earned, and finally allowed by the chancery court, before the prosecution was begun, and more than $9,300 of which had been so earned and allowed before the statute upon which the prosecution is based took effect (R. 36, 37, 48); and this, too, under a law which confers upon the trial court absolutely no jurisdiction whatever of the charge alleged, but which is even unconstitutional and void when judicially enlarged by retrospective construction to include the receivership fund involved in this case.

(2) The plaintiff in error and Lipscomb had been appointed (R. 31) chancery receivers by the Supreme Court of the District of Columbia on November 6, 1894, and had come into possession of certain money ($21,233.10) on June 28, 1895 (R. 37), and certain other money making a total of $24,415.13 (R. 36), and the further sum of $1,532.26 (R. 36). On March 3, 1901, Congress passed an

act to establish a code of laws for said District, to take effect ten months in the future—from and after January 1, 1902—and section 841 thereof is as follows:

> "Sec. 841. **Executors and Other Fiduciaries.**—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, *shall forfeit all right or claim to any commissions, costs, and charges thereon*, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

Under this section said receivers were indicted (R. 1-2) in said court on April 3, 1905, for the alleged embezzlement of a paper-stated but unsegregated balance ($15, 974.07) of said money on November 23, 1903. Before said act was passed they had fully earned and had been allowed but not paid from said fund by said court (R. 36) commissions, costs, and charges to the amount of $9,324.39; and before said indictment they had fully earned and had been allowed but not paid from said fund by said court (R. 36, 48) additional commissions, costs and charges to the amount of $746.43, making a total of $10,070.82, to which extent they become joint owners of said fund. No money whatever came into their possession (R. 77) or that of either of them after said code was passed; and there is no money whatever involved in this prosecution except the said balance of that which had come into their possession as aforesaid, and the said commissions, costs and charges thereon. On May 8, 1905 (R. 29), the plaintiff in error was simply railroaded to conviction under said indictment, but several months later his co-receiver was properly tried and promptly acquitted. The conviction was affirmed by the Court of Appeals (R. 85) on May 1, 1906. The right or claim of the plaintiff in error to said commissions, costs and charges goes to all of them—the whole sum of $10,070.82—and not merely to one-half thereof; but even if not, one-half exceeds $5,000. Construed retrospectively, as in this case, the said act is

unconstitutional and void by reason of its forfeiture clause. The writ of error was sued out under section 233 of said code, reading as follows:

> "Sec. 233. Any final judgment or decree of the court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

The forfeiture under section 841 is not merely of some right or claim to some commissions, etc., but "all right or claim to any" of them; nor is the forfeiture confined merely to commissions, but it extends to "costs and charges," and hence operates to leave a fiduciary deeply in debt for proper costs and charges which he has duly paid, even under express orders of the appointing court, as in this case.

Under said section 841 the said commissions, etc., are involved in this case, and measure the value in money of the matter in dispute. It can even be said that *the commissions, etc., are themselves the matter in dispute* for the purpose of jurisdiction on this writ of error, even though in one sense an incident to the prosecution for embezzlement. We concede the doctrine of *Chapman* vs. *United States*, 164 U. S. 436, and *Sinclair* vs. *District of Columbia*, 192 U. S. 16, that if this statute and proceeding involve only the bare question of guilt or innocence of the elemental act as a crime, this court has no jurisdiction on the writ of error, because in such event the matter in dispute is incapable of pecuniary estimation; but by the imperative terms of the statute itself, and the necessary effect of the judgment (if valid), the instant case presents as the matter in dispute one that is not only capable of pecuniary estimation, but has

actually been so estimated to the very penny (R. 36); whereas the *Chapman* and *Sinclair* cases were utterly devoid of this essential element.

While the mere guilt or innocence of the accused is ordinarily a matter that is incapable of pecuniary estimation, yet the statute can make it otherwise. Under section 841 the guilt and forfeiture are inseparable—the one cannot arise or exist without the other. The forfeiture is purely pecuniary, and can be said to make *the guilt or innocence a matter in dispute that is capable of a money valuation,* and moreover fixes this value as the amount of the commissions, costs and charges to which the accused is entitled. As a penal statute, section 841 is *sui generis* in more respects than one, while its re-editing by the lower courts fairly ruptures the law, the language, and the mental ligaments of the lawyer and layman, the lexicographer and philologist.

In denying a motion to dismiss an appeal from the Court of Appeals D. C., in *Shappirio* vs. *Goldberg,* 192 U. S. 232, 240, this court said:

> "To ascertain the right of jurisdiction • • • we look not to a single feature of the case, but to the entire controversy between the parties."

In *Smith* vs. *Whitney,* 116 U. S. 167, Smith, a Paymaster in the Navy, filed a petition in the Supreme Court of the District of Columbia for a writ of prohibition to the Secretary of the Navy and to a general court-martial convened by his order to try the petitioner on certain charges and specifications. Under the first charge were fourteen specifications, among which were alleged acts which constituted crimes under the laws of the United States and subjected the petitioner, if guilty, to imprisonment in the penitentiary, to dismissal from the service, and, as the direct result, the loss of salary of his office. Smith denied the jurisdiction of the court-martial to try him for any of the various offenses alleged in the charges and specifications, but his plea was overruled, and this was the basis of his application to the D. C. Supreme Court for a writ of prohibition. His petition was dismissed by that court, and he took an appeal from the judgment and also sued out a writ of error to reverse it.

In this court a motion was made to dismiss for want of jurisdiction. The court said (p. 173):

> "The final judgment or decree of the Supreme Court of the District of Columbia in any case in which the matter in dispute, exclusive of costs, exceeds the sum of $5,000 may be reviewed and reversed or affirmed in this court upon writ of error, if the judgment is at law, or upon appeal, if the decree is in equity.
>
> "The objection founded on *Kurtz* v. *Moffitt*, 115 U. S. 487, and cases therein cited, that this court has no appellate jurisdiction of the present case, because there is nothing in dispute the value of which can be estimated in money, cannot be sustained. The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service and depriving him of a salary as Paymaster-General during the residue of his term as such, and as Pay-Inspector afterwards, which in less than two years would exceed the sum of $5,000. * * * The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction."

So in this case, the matter in dispute is whether the plaintiff in error, as a chancery receiver, is subject to a prosecution ending in a sentence depriving him of "all right of claim to any commissions, costs and charges" as receiver, amounting to $10,070.82; or such commissions, etc., themselves can be considered as the matter in dispute for the purpose of jurisdiction. It is not the form, but the substance, of the proceeding that determines the matter in dispute. The statute controls absolutely the entire controversy. Property rights are often concluded in criminal cases (see *infra*), and criminal issues are often determined in civil cases as the basis of pecuniary claims. There is no hard and fast rule to prevent such proceedings and results, especially when based upon statutes.

Smith vs. *Adams*, 130 U. S. 167, was an appeal from Dakota Territory, and involved an election contest. On motion to dismiss for want of jurisdiction, the court said (p. 175):

"It is conceded that the pecuniary value of the matter in dispute may be determined [1] not only by the money judgment prayed, where such is the case, but [2] in some cases by the increased or diminished value of the property directly affected by the relief prayed, or [3] by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. * * * So in a case impeaching the right to an office, the amount of the salary attached to it is considered as determining the value of the matter in dispute. Thus in *Smith* v. *Whitney*, 116 U. S. 167, 173, where the application was for a writ of prohibition restraining proceedings by court-martial against an officer, an objection being taken to the appellate jurisdiction of this court that the subject matter of the suit was incapable of pecuniary estimation, the court, by *Mr. Justice Gray*, replied: 'The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster-general during the residue of his term as such, and as pay-inspector afterwards, which in less than two years would exceed the sum of five thousand dollars. * * * The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction. * * *.'

"The acquisition or loss of the land in question is not a necessary consequence of the election for the county seat, such result not being created by law, but by a mere accident arising from a voluntary gift by Aberdeen made contingent upon the removal of the county seat to that place and its continuance there. In *Smith* v. *Whitney*, the salary was given by the law and went with the tenure of the office."

In the present case, the forfeiture of all right or claim of the plaintiff in error to any commissions, costs, and charges, *is* a neces-

sary consequence of the basic act which the judgment (if valid) conclusively establishes, such result being created by law, and not arising from a mere accident. These commissions, etc., were given as of right by the chancery court under the law, and went with the tenure of office of receiver. The forfeiture does not arise from any private or collateral agreement or condition, nor from any accident or incident, but flows imperatively from the law itself. It is not the judgment, but the statute, that produces the forfeiture on the commission of the elemental act. "No conviction or judgment shall work corruption of blood or forfeiture of estate." R. S. U. S., section 5326. Of course, as has often been decided, when a statute like section 841 declares a forfeiture on facts that have not already occurred, a judicial proceeding is necessary, under the federal Constitution, to determine whether the prescribed element exists which is to operate the forfeiture. The judicial proceeding necessary under section 841 is in form criminal, and perhaps that only. The judgment (if valid) simply stands as conclusive evidence that the basic fact upon which the forfeiture arises has been judicially determined to exist. In one sense, however, the judgment (if vadid) itself effects—and certainly perfects—the forfeiture; and this is undoubtedly true so far as jurisdiction to review such judgment is concerned. The distinction between a thing and the evidence of it affects not the substantial practical result to an interested party.

In *Stinson* vs. *Dousman*, 20 How. 461 (approved in *Shappirio* vs. *Goldberg*, 192 U. S. 232, 240), the action was brought to recover $481.16 as rent of a parcel of land, under a written contract by which Dousman agreed to sell the land to Stinson for $8,000. If Stinson defaulted, Dousman could declare the contract ended and recover as rent the interest agreed to be paid on the purchase money. Stinson did default, and Dousman sued and recovered judgment for $481.16, and costs, *containing only the usual recitals of a money judgment*. Stinson took out a writ of error. It was objected that this court had no jurisdiction because the matter in dispute was not of the value of $1,000, but the objection was overruled. The court said (p. 467):

> "The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of the rent claimed, but the title of the respective parties to the land under the contract. The contract shows that

> the matter in dispute was valued by the parties at $8,000. * * * We think this court has jurisdiction."

In the case at bar, the *effect* of the judgment (if valid) is conclusively to adjust and establish the legal and equitable claims of the parties to the commissions, costs, and charges, and to fix the absolute forfeiture of them in favor of the United States and against the plaintiff in error. The subject of this prosecution is not merely the guilt or innocence of the accused, but there is in controversy the title of the respective parties to the commissions, etc., under the imperative forfeiture clause of the statute, amounting (R. 36) to $10,070.82, as affirmatively shown by the Government's own evidence.

In *McNeill* vs. *Southern Ry. Co.*, 202 U. S. 543, 558, it was held that where the controversy presented by the bill involves the right to enforce statutory penalties and forfeitures against the complainant, over the jurisdictional amount, this gives jurisdiction, though the dispute which was the origin of the controversy involved less, and no proceedings to enforce the penalties and forfeitures had been actually filed.

In *Scott* vs. *Donald*, 165 U. S. 107, 115, the bill was filed to enjoin the threatened seizure of liquors about to be imported by the complainant into South Carolina. The right so to import such liquors was held to be the matter in dispute for the purpose of jurisdiction; and this court also held that the complainant was not required to postpone his suit until his property to an amount exceeding the jurisdictional value "has been actually seized and confiscated."

So here, the accused is not required to wait until the Government has actually seized and physically confiscated his commissions, costs, and charges. The judgment (if valid) is conclusive of the absolute destruction of all his right or claim to any of them. No other judicial proceedings are necessary. A mere demand by the United States on the receivers, based upon this judgment (if valid), cannot lawfully be resisted, for the judgment (if valid) conclusively establishes the Government's right, title and ownership to all right or claim which the plaintiff in error had thereto, and the amount is fixed to a penny by the evidence. The statute is self-invoking and self-executing, and operates *ex proprio vigore* to transfer absolutely from the plaintiff in error to the United States "all right or claim" of the former to

these commissions, costs, and charges, *eo instanti* the basic act is committed. *United States* vs. *Stowell*, 133 U. S. 1, 16. *The Mary Celeste*, 16 Fed. Cas. 968, 969. *Pilcher* vs. *Faircloth*, 135 Ala. 311, 313. *United States* vs. *Olsen*, 57 Fed. Rep. 579, 586. 13 *Am. & Eng. Ency. Law*, 58, 59, 60.

> "When the object of the suit is not directly and expressly for the purpose of obtaining a money judgment, the amount involved is determined by the value in money of the relief to the plaintiff or the loss to the defendant should the relief be granted, or, *vice versa*, should the relief be denied. If the amount thus estimated is in excess of the lowest limit of appellate jurisdiction, the court will take cognizance." 2 *Cyc.* 544, 545. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 310, 311 (bill seeking injunction and dissolution of an association of common carriers for the regulation of rates, and it was held sufficient to confer jurisdiction upon this court that it appeared that the saving in rates exceeded $1,000 per day.) *Harris* v. *Barber*, 129 U. S. 366, 369, 370 (possession of realty.) *Carter* v. *Cutting*, 8 Cranch. 251, 252 (if the probate of a will has any legal operation and is not merely void, the controversy as to the validity of the probate is a matter in dispute equal to the value of the estate devised away from those seeking to revoke the probate.) An appeal will lie from a judgment of forfeiture on a bail bond in a criminal prosecution, the matter of forfeiture being attracted to the criminal prosecution; and so also an appeal will lie where cash bail has been forfeited. 2 *Cyc.* 548, 549.

In *Troy* vs. *Evans*, 97 U. S. 1, a writ of error was sued out to review a judgment for less than $5,000. The bonds sued on were payable in instalments and amounted in all to more than $5,000, while the instalments due when the judgment was rendered were less. These bonds were held by the plaintiff only as security for a debt. It was contended that the Supreme Court had jurisdiction because the judgment would be conclusive in another action by the plaintiff on the bonds as to the liability of the defendants to the extent of the debt secured, *but it nowhere appeared that this debt exceeded $5,000.* A motion to dismiss for want of jurisdiction was granted and the court said (p. 3):

> "Conceding all that is claimed in the argument opposing this motion, to wit: that the judgment in this action will be conclusive in another by the present plaintiffs upon the same bonds as to the liability of the defendants upon the bonds to the extent of the debt of Jones, for which they are held, still our jurisdiction cannot be maintained, unless it also appears that this debt exceeds $5,000. * * * If jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount."

(3) If these commissions, etc., be in one sense an incident to the prosecution for embezzlement, still this court has jurisdiction.

Simms vs. *Simms*, 175 U. S. 162. Suit by husband against wife for divorce *a vin. mat.* Motion by wife, pending suit, for order for $5,000 counsel fees and suit money, but no order on same until final decision on merits. Bill dismissel, and by same decree wife awarded $5,250 for counsel fees and maintenance. Appeal by husband to Supreme Court of Territory, which affirmed. Appeal to the Supreme Court of the United States. Motion to dismiss for want of jurisdiction, because the decree concerned divorce and alimony only. The court said (p. 168):

> "So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on this appeal; * * * because that was a matter the value of which could not be estimated in money.
>
> "The decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal."

De La Rama vs. *De La Rama*, 201 U. S. 303. Appeal from the Supreme Court of the Philippine Islands to review a decree which reversed a decree for divorce and alimony and directed that the complaint be dismissed. The suit was brought by the wife for divorce, division of marital property, alimony, counsel fees and

costs. The trial court granted her the relief prayed, together with the sum of about $84,000 for her share of the conjugal property and as an allowance for her support since the date of the institution of the suit. On reversal of this decree because of the proof of her own guilt of the crime of adultery, she appealed to this court to which the law gives appellate jurisdiction in all cases "in which the value in controversy exceeds twenty-five thousand dollars." Motion to dismiss for want to jurisdiction.

The court reiterates the rule that the federal courts have no jurisdiction on the subject of divorce, or for the allowance of alimony, either as an original proceeding, or an incident to divorce, because a suit for divorce in itself involves no pecuniary value; but holds that this rule does not apply to the jurisdiction of the courts of those places (including the District of Coulmbia?) wherein Congress has full legislative power over all subjects on which a state legislature can legislate within the State, nor to the appellate jurisdiction of the United States Supreme Court over those courts. The *Simms* case (175 U. S. 162) is then referred to at length, and the foregoing language quoted with approval, but attention is called to the fact that the appeal in that case did not involve the merits. The court says that the judgments and decrees of the Supreme Court of the Philippine Islands are reviewable on appeal or writ of error in the same manner as the final judgments and decrees of the circuit courts of the United States. The wife's right to a division of property, to alimony, counsel fees and costs, rested entirely upon the question whether she was guilty or innocent of adultery, and therefore on the proof on the subject of divorce. The court says that the hardship of denying an appeal in this case, as well as a review of the testimony upon the subject of divorce, is apparent; that for the purposes of jurisdiction it makes no difference whether the amount claimed be termed alimony or the wife's share of the community property; that it is sufficient that she claimed to be entitled to an amount exceeding $25,000, and that her claim was not baseless is shown by the first decree; but by the decree of the appellate court she was denied all recovery of any description upon the ground of her adultery; if, on a review of the testimony, it were found that she was not guilty of adultery, she would be entitled to one-half of the conjugal property. The court held the appeal properly taken, and that it called for a re-examination of the grounds on which the petition was denied; and

thereupon found that the proof did not show the wife's guilt, and reversed the decree appealed. As to passing on the sufficiency of the testimony authorizing or refusing the divorce, and showing her guilt or innocence, the court said (p. 310):

> "While, as indicated in *Simms* v. *Simms*, the decree for alimony, although in one sense an incident to the suit for divorce, is a distinct and final judgment for a sum of money, and is therefore a good ground for appeal from that part of the decree, yet, where the appeal is from the whole decree (as in this case), or even from a part of the decree, and the denial of alimony or separation of the conjugal property depends upon the evidence which bears upon the right to a divorce, we cannot determine that question without passing upon the sufficiency of the testimony authorizing or refusing the divorce. An appeal from the decree for alimony or other property right would be of no value whatever unless the facts connected with the allowance or refusal of such right were open to review in the appellate court. Although an appeal from a part of a decree does not bring up the part not appealed from, yet, if the whole decree must be reviewed in order to decide the appeal, such appeal brings up the entire record [citing cases]. The case is even stronger where the appeal is taken from the whole decree."

So in the instant case, though this court may have no jurisdiction of the embezzlement feature of the case as such, yet it has of the forfeiture feature, but it cannot determine the latter without passing on the sufficiency of the evidence of the former, because both points of the case rest upon exactly the same evidence; and this, therefore, opens the whole record and sets the matter at large.

(4) In *Callan* vs. *Wilson*, 127 U. S. 540, on appeal from the Supreme Court of the District to review an order refusing Callan's discharge, on *habeas corpus*, from custody under a sentence of the police court, convicting of conspiracy, this court took jurisdiction and reversed the judgment and discharged the prisoner, on the ground that the conviction was void because he had not been accorded his constitutional right of trial by jury.

U. S. ex rel. Steinmetz vs. *Allen*, 192 U. S. 543. Petition for mandamus in Supreme Court D. C., to compel Commissioner of Patents

to require primary examiner to forward petitioner's appeal to board of examiners in chief for review of ruling of primary examiner. Petition dismissed by Supreme Court D. C., and its judgment affirmed by Court of Appeals D. C. Writ of error to this court. Motion to dismiss for want of jurisdiction denied. The court reversed and said (p. 555):

> "The jurisdiction of this court to review the judgment of the Court of Appeals is questioned. There is no money in dispute, nor anything to which a pecuniary value has been given. * * * We think * * * we have jurisdiction and the motion to dismiss is denied."

(5) In the present case the statute itself defines the controversy between the parties, and imperatively requirees that the doing of the elemental act shall produce two results, one civil and the other criminal, viz: (1) "shall forfeit all right or claim to any commissions, costs, and charges thereon," and (2) "shall be deemed guilty of embezzlement * * * and shall be punished" by fine or imprisonment or both. The forfeiture is no part of the punishment of the act as a crime, but in terms is cut away from such punishment; yet the forfeiture is given only by this very statute, and the direct and immediate effect of this prosecution and judgment (if valid) is to establish the elemental fact from which it arises: and it is so necessarily and directly involved in this case that this judgment (if valid) is absolutely conclusive of it both in this and any other proceeding. *Judgments are never conclusive of matters not involved.*

The law confers no rights upon individuals, but only upon the United States. It does not declare the beneficiary of the forfeiture, and it therefore goes exclusively to the United States that enacted the statute. 13 *Am. & Eng. Ency. Law* 69. This forfeiture is a matter solely between the parties to this case. The Government can no more waive it (which it has not done) than the plaintiff in error can avoid it. The statute is mandatory. The forfeiture follows the commission of the basic act, and its establishment by this judicial proceeding (if valid), as certainly as does the punishment prescribed. *Ita lex scripta est.*

The act provides no special remedy by which the forfeiture is to be enforced. The revenue laws involved in *Coffey* vs. *United States*, 116 U. S. 436 (1886), provided for criminal prosecution and for

forfeiture, but declared that (R. S. U. S. Sec. 3453) "the proceedings to enforce such forfeiture shall be in the nature of a proceeding *in rem.*" Coffey was prosecuted criminally and acquitted. The Government then proceeded against the property seized, by information *in rem* to enforce the forfeiture. Coffey intervened as claimant and pleaded his acquittal in bar, but the trial court held it no bar. This court reversed and held (syllabus):

> "A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws is conclusive in favor of the defendant, as claimant of the property involved in a subsequent suit *in rem*, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property."

The *Coffey* case was carefully considered in *United States* vs. *Three Copper Stills* (1890), 47 Fed. Rep. 495, and the court said (p. 497):

> "Although the court in that case [*Coffey* v. *United States, supra,*] declined to express an opinion as to whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit *in rem* under that section, it must necessarily follow from the reasoning of the court that if an acquittal is conclusive on the United States, *a conviction must be conclusive on the convicted claimant.*"

In the *Coffey* case the court expressly left open (p. 444) the questions (1) whether a judgment of conviction in a criminal prosecution is conclusive against the accused as claimant in a subsequent suit *in rem* to enforce the forfeiture, and (2) whether a judgment of forfeiture is conclusive against the claimant in his subsequent criminal prosecution.

The court adverts (p. 445) without express approval or comment to the facts and decision in *United States* vs. *McKee*, 4 Dill, 128, (1877). McKee was convicted and punished for conspiracy with certain distillers to defraud the United States of taxes on spirits. Afterwards the Government brought an action against him under another section, to recover double the amount of the taxes lost by the conspiracy and fraud. The two transactions were one. The

court held that the action for the penalty was barred by the criminal judgment and punishment, as he could not be twice punished for the same offense.

The reason and result of the later cases are contrary to the *McKee* case. *United States* vs. *Three Copper Stills* (1890), 47 Fed Rep. 495, 499. *Matter of Leszynsky* (1879), 16 Blatch, 9, 13. *United States* vs. *Olsen* (1893), 57 Fed. Rep. 579, 583. See also *United States* vs. *Schneider*, 35 Fed. Rep. 107, 108 (1888). In the *Three Copper Stills* case it is pointed out (p. 500) that this court in the *Coffey* case did not adopt the reason of the *McKee* case, but the inference to be drawn from the language used "is rather that there could be a subsequent suit *in rem*, or a subsequent indictment, as the case might be."

The first question left open in the *Coffey* case has since been directly decided in the affirmative in *United States* vs. *Three Copper Stills, supra,* involving a forfeiture under the revenue laws, in which it was held that a conviction on an indictment is conclusive against any claim of the accused to the property seized (pp. 496-497) "but the sentence of forfeiture did not follow upon this conviction under this indictment, because Congress has provided another mode of procedure. * * * A proceeding *in rem* is necessary to declare and perfect the forfeiture. See Section 3453 R. S. U. S. Rule 22, Admiralty Rules."

The court (pp. 498-499, 500) notes the important fact that under a statute like section 841 here involved, the forfeiture does not arise except on guilt of the very offense denounced—no forfeiture can arise or exist without or apart from the defendant's guilt, but they are inseparable. This is not a case where the thing can be guilty, and the person innocent. How can we strip section 841 of the element of forfeiture any more than of guilt or punishment? How can it be said that guilt is involved but forfeiture is not? We must take the statute in its entirety as we find it, or let it alone altogether. It cannot be split up or emasculated to suit anybody or for any purpose.

The *Coffey* case was approved in *Boyd* vs. *United States,* 116 U. S. 616, 634 (1886), *Zucker* vs. *United States,* 161 U. S. 475, 478 (1896), and *Stone* vs. *United States,* 167 U. S. 167, 178, 184-188 (1897). The *Stone* case was an action to recover the value of certain timber unlawfully cut from government land in Idaho. Stone pleaded that

he had been indicted for cutting such timber, and acquitted, and relied on the *Coffey* case. This court held his plea bad, and pointed out that the *Coffey* case decided that the same facts could not be relitigated "as the basis of any statutory punishment," etc., while the action against Stone was merely one by the United States as the owner to recover for the value of its property cut and taken by him.

In *Forsyth* vs. *Hammond*, 166 U. S. 506, 518, this court said:

> "Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

This judgment (R. 26-27) does not recite nor declare the forfeiture in terms, but it might well have done so without affecting its validity, since the statute has provided no special remedy to establish it. *Miller* vs. *State*, 149 Ind. 607, 620 (1898). *Vowells* vs. *Commonwealth*, 84 Ky. 52, 55 (1886). *Commonwealth* vs. *Pennock*, 3 S. & R. 199 (1817). *Schuler* vs. *State*, 160 Ind. 300, 301, 310 (1903). 19 *Ency. P. & P.* 483. *Paley on Convictions* (London, 1904), 276, 277. *Burton* vs. *United States*, 202 U. S. 344, 369. The mere fact that the judgment does not recite the forfeiture in terms has no force whatever to exclude it from this controversy, since the statute requires it. These authorities so show. The law, not the mere form of the judgment, fixes the matter in dispute in this case. The effect of the judgment controls, not its bare recitals.

If the forfeiture statute prescribes a special remedy, that is exclusive; but if not, the forfeiture can be judicially established by criminal information or indictment. Sec. 841 provides no special procedure to establish judicially the fundamental fact which operates the forfeiture, but it is attracted to and is to be established by indictment, as in this case. This prosecution and judgment (if valid) conclusively establish the forfeiture judicially, as against the plaintiff in error and in favor of the United States. If it cannot be reviewed in this case, it can never be in any other, if valid.

The customs revenue statutes and the maritime laws generally require seizures and civil proceedings *in rem* to establish the forfeiture prescribed. They apply to tangible property. But where the law prescribes (as does section 841) a pecuniary forfeiture of "all

right or claim," etc., rather than a specific tangible property forfeiture, as one of the results of the omission or commission of a certain act also made a criminal offense, especially by the same law, the proper proceeding to establish such forfeiture is a criminal prosecution by and in the name of the United States, unless the statute provides a different and exclusive remedy. *Ransdell* vs. *Patterson*, 1 App. D. C. 489, 495. *U. S.* vs. *Moore*, 11 Fed. Rep. 248, 250, 251. *U. S.* vs. *Craft*, 43 Fed. Rep. 374, 375. *U. S.* vs. *Bougher*, 6 McLean 277, 280, 281. *U. S.* vs. *Nash*, 111 Fed. Rep. 523, 528, 529. *U. S.* vs. *Mattingly*, 26 Fed. Cas. No. 15743. *U. S.* vs. *Hoskins*, 5 Mackey, 478, 480. *U. S.* vs. *Ebert*, 25 Fed. Cas. No. 15019. R. S. U. S. sections 1041, 3213.

The forfeiture of section 841 is purely pecuniary, and the Government has affirmatively proved its exact amount—$10,070.82—in this case (R. 36). The statute requires it imperatively, and it is therefore impossible to prosecute under this law without directly involving this pecuniary matter. Both the pecuniary or property rights of the plaintiff in error are as certainly and directly involved in this case as his guilt or innocence of crime. A proceeding in form criminal is proper (if not necessary) to establish this forfeiture. Its omission from the recitals of the judgment are not material as to what is involved, nor can such omission change the matter in dispute nor defeat the writ of error, even though so intended. The statute and the effect of the judgment still control. The forfeiture is not, in the eye of the law or in fact, any part of the punishment of the basic act as a crime *(sic)*. The law itself is so worded, the Court of Appeals so holds (R. 84), and the Government so argues in the brief on the motion to dismiss (p. 8).

(6) In so far as the statute and this proceeding and judgment are intended to operate a forfeiture of the vested rights or claims of the accused to the commissions, costs and charges which had been adjusted and allowed him before the code, amounting to about $10,000 (R. 36), the law is invalid because in plain violation of the federal Constitution; in which aspect of the case the writ of error will lie to review this judgment, without regard to the sum or value of the matter in dispute, under Code D. C. Sec. 233, *supra*.

In *Territory of New Mexico, ex rel. McLean & Co.*, vs. *Denver & R. G. Ry. Co.*, 203 U. S. 38, 47, the question of the jurisdiction of this court over a judgment of the Supreme Court of that Territory

under the Act of March 3, 1885, 23 Stat. L. 443, was under consideration on a motion to dismiss the appeal. This act formerly applied to the Supreme Court of this District as well as to the territorial courts, and our present law—Code D. C. Sec. 233, quoted *supra*—is merely a substantial re-enactment of it. The proceeding was *mandamus* to compel a common carrier to receive for transportation beyond the territorial limits, hides which did not bear the evidence of inspection required by a territorial act made in pursuance of authority of Congress, but which it was insisted by the appellant was null and void as in contravention of the federal Constitution.

The motion to dismiss was denied on the grounds that the validity of an authority exercised under the United States was drawn in question, the matter in dispute was the right to have the goods transported, and this right was measurable in money, though the amount involved was confessedly less than $5,000.

(7) Certain erroneous statements of fact have inadvertently crept into the brief of the learned Solicitor General. After stating how the questions of the constitutionality or validity of the statute, and its construction and application, were directly raised by us in both courts below, he says (p. 7) that the record affirmatively shows (R. 34-36) that all commissions, costs and charges, amounting to about $10,000, had been allowed and paid to the receivers long before the finding of the indictment; but the record shows only the allowance in full, and not the payment in full, unless the Government concedes that all of the acts of alleged embezzlement (R. 38-41) were not embezzlements, but proper payments. Even if paid, the statute surely forfeits the right to retain them, because it does not distinguish between paid and unpaid commissions, etc. On the contrary, it expressly includes "all" right or claim to "any" of them, thus applying to both the paid and unpaid. One can forfeit only that which he has, not that which he has not.

He further says (p. 7) that the indictment charges the receivers with the embezzlement of the net sum remaining for distribution; but there was no net sum except on paper—by a mere statement of account. There was no actual segregation of the sum charged in the indictment, but it was and remained a part of the gross amount received (R. 36).

He further adds (p. 7) that "the testimony all relates to the conversion of the net sum chargeable against the receivers exclusive

of commissions, charges and costs;" but the record clearly and conclusively shows (R. 38-41) that the testimony concerning the alleged conversion relates indiscriminately and without any election to every payment or disbursement ever made at any time or for any purpose by the receivers from July 6, 1895, to a date subsequent to the indictment date, without anything to show to whom or for what purpose or by what authority or want of authority such payments or disbursements were made (except in two instances), and only with loose and general reference to the gross sum received, and with no special reference at all to the net sum charged. The two excepted instances (R. 39, bottom) of $210 and $248.43, speak for themselves.

He also says (pp. 8-9) that in the recent case of *Burton* vs. *U. S.*, 196 U. S. 283, under R. S. 1782, which provides that persons convicted thereunder shall be incapable of holding any office under the United States, there was no inclusion of the forfeiture in the judgment. This is true; but in the more recent case of *Burton* vs. *U. S.*, 202 U. S. 344, 369, under the same statute, there was an inclusion of the forfeiture in the judgment.

The Government is not at liberty, as contended, to invoke any one or more of the provisions of section 841, and reject the rest, at its option; but it must take the statute as an entirety or not at all; otherwise it would have the right to make the law; and if it has such right, then the accused must also have it; and thus the law as enacted by Congress would become subject to the will of the parties to the particular proceeding.

We admit the doctrines of all the cases cited by the Government; but they do not control this case, because the vital element absent in each of them is present here, namely, a matter directly in dispute that is capable of pecuniary valuation.

Why did the prosecution take such special pains to prove (R. 36) all of the details of the commissions, costs, and charges, even to the very penny? Was this mere pastime? Or was it for the purpose of conclusively establishing the forfeiture, and showing the exact amount of it, so as absolutely to deprive the accused by this proceeding and judgment of "all right or claim to any commissions, costs, and charges" on the receivership fund? How can it be consistently

claimed that the forfeiture is a matter directly in dispute in this case for every purpose except the jurisdiction of this court?

(8) The exact jurisdictional question now presented does not appear to have been decided by this court. On October 16, 1906, we therefore filed in this case our petition that the writ of *certiorari* issue if the writ of error be untenable (which it is not), and this petition will be submitted with the motion to dismiss. The consideration that this judgment (if valid) is conclusive of the forfeiture, affords of itself a powerful reason for the writ of *certiorari*, if the case be improperly here on the writ of error.

Our contention that the trial court had absolutely no jurisdiction whatever of the alleged offense and fund involved in this case is presented elsewhere in detail; as is also our claim that the statute is unconstitutional and void by reason of its forfeiture clause, when construed retrospectively (as in this case) to include the same.

We think this court has jurisdiction on the writ of error, and respectfully submit that the motion to dismiss should be overruled.

In view of the premises, and the important questions presented by this record and the petition for *certiorari* in this case, it may not be improper to suggest that the determination of both the motion to dismiss and the petition for *certiorari* be postponed to the hearing on the merits.

Respectfully submitted.

HENRY E. DAVIS,
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Washington, D. C.,
January, 1907.

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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1906.

Office Supreme Court, U. S.
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CLERK

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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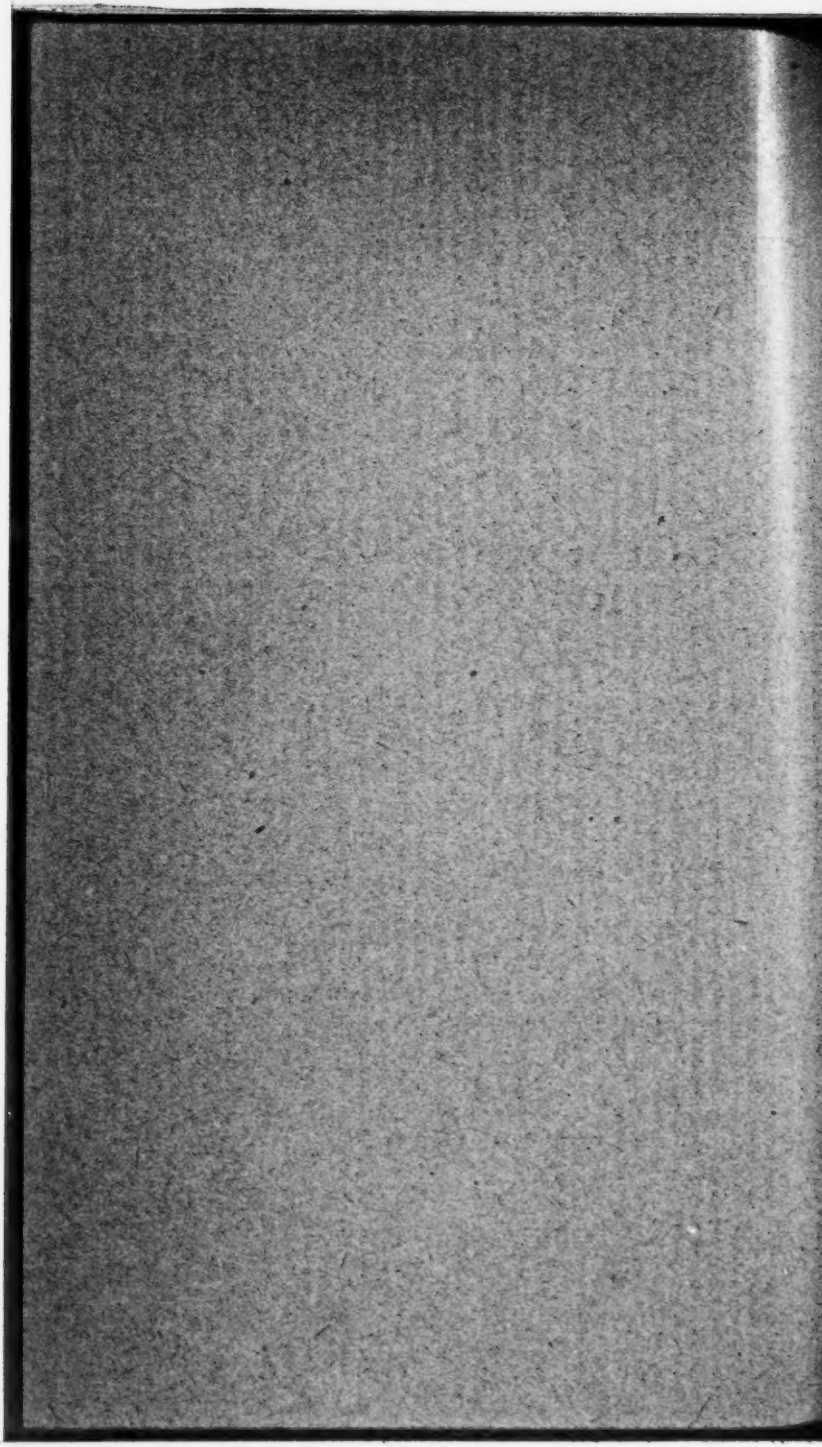

In the Supreme Court of the United States

OCTOBER TERM A. D. 1906.

THOMAS M. FIELDS,
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the Supreme Court of the United States

OCTOBER TERM A. D. 1906.

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No. 395.

In Error to the Court of Appeals of the District of Columbia.

Brief and Argument in Support of Petition for Writ of Certiorari.

I. TRIAL COURT HAD NO JURISDICTION.

(1) Section 841 Does Not Apply to This Case.

This prosecution is based exclusively upon the intensely penal section 841 of the code of law of the District of Columbia. The code is composed chiefly of old laws carried forward, but this section is entirely new, original, exclusive and the first legislation on the subject of embezzlement by fiduciaries ever passed or in force in this District.

Section 841 appears under the title "Offenses against Property," and contains in and of itself, and without any reference *aliunde, and as a condition precedent to its operation,* a complete, specific and particular description of the classes of persons and property and possession that it includes and requires, and a like description of the character of the property of the class to which it applies. The pertinent parts are as follows (R. 76):

> "Any * * * receiver * * * *into* whose possession money * * * of any other person *may come* by virtue of his office or employment, who *shall* fraudulently convert or appropriate the same to his own use, *shall* forfeit all right or claim to any commissions, costs, and charges thereon, and *shall* be deemed guilty of embezzlement of the entire amount or value of the money or other property so *coming* into his possession and converted or appropriated to his own use, and *shall* be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

The trial court was absolutely without jurisdiction of this case, because the statute is purely prospective, and includes only persons and property that *"may come"* into possession in the future—*"coming"* property—while this prosecution relates only to persons and property that *had come* into possession in the past—six years before the statute was enacted and seven years before it took effect. The law is strictly limited to "any * * * receiver * * * into whose possession money * * * *may come* * * * who shall fraudulently convert * * * the money * * * *coming* into his possession."

The judges below simply usurped jurisdiction by interpolating into the statute words of retrospective effect, so as to make it meet the exigencies of this case, which otherwise it concededly cannot do.

In *Eddy* v. *Morgan*, 216 Ill. 437, the court said (p. 447):

> "In the construction of statutes it is the duty of the court to take the words found in the statutes and to give to each its ordinary, usual meaning. We are not permitted to qualify words there found by introducing other words which would change the effect of the act, to make it comport more nearly with what we think it ought to be. As was said by *Mr. Justice Tindall*: 'It is the duty of courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing. We must not import into an act a condition or qualification which we do not find there.'"

The trial judge read into the act the words *"may be"* for *"may come,"* and the appellate judge (R. 78) interpolated the phrase

"may have passed." Both proceeded solely upon the theory (R. 77-78) that there was *no reason* for Congress to make a distinction between the past and future, and that the exclusively prospective language of the section was used inadvertently and unintentionally, while Congress meant to provide for the past.

The trial judge said:

> "To construe a statute is to do no more than come at the intent to be expressed by the legislature through the use of words. Sometimes there could not have been any reason for a particular intention. Therefore it comes to be determined whether or not these words '*may come*' were intended by Congress to convey their technical, literal, grammatical significance, or whether they were used as synonyms for some other word or set of words. In the first place, there is *no reason* for any legislation which would carry with it the distinction which counsel for the defendant claim is carried by these words. * * * There is no retroactive force attributable to this statute by giving these words '*may come*' the significance of the words '*may be.*' * * * It was as much the intention of Congress by this section to reach the cases of receivers already appointed and who were already in possession of property, as it was to reach the cases of receivers who may be appointed to-morrow and who may come into possession of property to-morrow. I remember one case wherein a question analogous to this was decided, *M. & L. Ry. Co.* vs. *Herrick,* 13 Bush. 122, in which was construed a statute reading: 'A married woman who shall come to this Commonwealth without her husband, he residing elsewhere, may acquire property, contract, and bring and defend actions as an unmarried woman,' etc. The court said: 'To exclude her because the statute speaks only of married women 'who shall come,' etc., would be to adhere to the letter of the law and to disregard the spirit. It was intended as an enabling act for the benefit of a class of persons laboring under legal disabilities, and not enjoying the protection incident to the state of marriage, because of the absence from the Commonwealth of their husbands; and a person clearly within this class will not be denied the benefit of a remedial statute by grammatical construction.' "

Endlich on Interpretation of Statutes says (section 329) that a penal statute must expressly apply to the particular case, in order to include it. In ascertaining its meaning "the court cannot go beyound the plain meaning of the words and phraseology employed, in search of an intention not certainly implied in them; in other words, whilst a case may come within the purview of a remedial statute unless its language, properly construed, excludes it, it is excluded from the reach of a criminal statute unless the language includes it; unless the proper meaning of the language of the statute brings a case within its letter the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction; and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended, it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language."

The language just quoted was approved in *Todd* v. *U. S.*, 158 U. S. 278, 282, and in *Ex p. Bailey*, 39 Fla. 734, 743.

It is unquestionable that when the legislature intends the infliction of punishment, it will not leave its intention to be gathered by mere doubtful inference, or convey it in cloudy or dark words only, but will manifest it with reasonable clearness; for an offense cannot be created or inferred by vague implications. *End. Inter. St.* Sec. 329.

> "A penal law must be construed strictly, and according to its letter. * * * The purpose of the rule is to prevent acts from being brought within the scope of punishment, because courts may suppose they fall within the spirit of the law, though not within its terms." *Com.* vs. *Cooke*, 50 Pa. St. 201, 207.
>
> "Acts of this kind are not to be regarded as including anything which is not within their letter as well as their spirit (*Dewey* vs. *Goodenough*, 56 Barb. 54, 57) and which is not clearly and intelligently described in the very words of the statute, as well as manifestly intended by the legislature." *Wilb.* 246.

In *Amy* v. *Watertown No. 2*, 130 U. S. 320, the court said (p. 324):

"The general rule is that the language of the act must prevail, and no reason based on apparent inconvenience or hardship can justify a departure from it, * * * for otherwise the court would make the law instead of administering it."

In *U. S.* v. *American Sugar Co.*, 202 U. S. 563, the question was whether the act of Congress of Dec. 17, 1903, relating to the Cuban Treaty, operated to make the treaty retrospective so as to include in a provision for tariff reduction certain sugars imported into the United States between the dates when the treaty was made and when it took effect. With one exception (*"are now"*) the act was expressed in the simple future tense (p. 578, *"shall continue,"—"shall remain,"—"shall receive,"—"shall be admitted"*). The court answered in the negative, and unanimously said (pp. 577-578, 579):

"It was certainly competent for Congress (with the consent of Cuba) to have given the treaty retrospective, immediate, or prospective operation. Which did Congress do? And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' *United States* v. *Burr*, 159 U. S. 78, 82.

"Turning to the act of December 17, we find it expressed in the simple future tense, and this must be given weight. *United States* v. *Goldenberg*, 168 U. S. 95, 102. So far as the text of the act itself is concerned, all of its parts accord; all of its provisions are prospective but one. * * * The words of the act, therefore, refer manifestly to an event to occur. * * * We cannot suppose that, if Congress intended to give retrospective operation to the act, it would have used the words that expressed the contrary. The day at which the treaty should operate * * * was of easy expression. Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other."

In section 841, did Congress use the terms, *"may come,"* and *"shall,"* and *"so coming into his possession,"* to refer to events that had already occurred? Did it inadvertently or unintentionally use the language that expresses only the future while it meant to provide for its antipode, the past? Can a court construe this language to include past events? Can a judge interpolate the retrospective language which Congress omitted? Can a court consider the object designed to be reached, or the mischief sought to be suppressed, or any other matter *dehors* the statute, where it is clear upon its face, and when standing alone it is fairly susceptible of but one construction? Can a judge re-edit a statute because he can conceive no *reason* why Congress should make a distinction between the future and the past?

The appellate judge said (R. 77, 78):

> "The fact which may be inferred from the indictment is made certain by the evidence, namely, that the money came into the possession of the receivers prior to the enactment of the Code. * * *
>
> "Words like *may*, must, *shall*, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. * * * It is inconceivable that Congress intended to make a distinction in respect of property * * * dependent upon the time when the same shall have come into * * * possession * * *. There is no possible foundation in law or morals for such a distinction, and unless compelled by an unmistakable expression of such an intention, no court would be justified in adopting a construction that would give it recognition. * * *
>
> "We are of the opinion that the learned trial justice did not err in holding that Sec. 841 comprehends property that *may have passed* into the defendant's possession as receiver before the time that it went into effect."

In *Martin* v. *Martin*, 27 App. D. C. 59 (Feb. 6, 1906, *per* Shepard, Ch. J.), the court, in holding (p. 62) "that where a statute requires an oath to be made by a party * * * it is not satisfied by the affidavit of his attorney or agent," said (p. 62):

"The intent of the lawmakers is to be found in the plain language of their enactment. Considerations of inconvenience and hardship * * * may well operate upon the makers of the law, but cannot justify a judicial addition to the letter of the statute. *Ohio Nat. Bank* v. *Berlin*, 26 App. D. C. 218, and cases cited."

In *Todd* v. *U. S.*, 158 U. S. 278, this court said (p. 282):

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

The same language was used in *U. S.* v. *Brewer*, 139 U. S. 278, 288, and in *Lacher* v. *U. S.*, 134 U. S. 624, 628, 629.

In *Ex p. Bailey*, 39 Fla. 734, the court said (p. 743):

"The established rule is that a penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within them that is not within their letter as well as their spirit; nothing that is not clearly and intelligently described in the very words of the statute as well as manifestly intended by the legislature. And where a statute of this kind contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

In *U. S.* v. *Potter*, 56 Fed. 83, the court said (p. 88) that the effect of the Sixth Amendment begins—

"with the statutes fixing or declaring offenses, and, as to them, insures the general rule of the common law that they are not to be construed to embrace offenses which are not within their intention and terms. * * * They must be in some way declared by the legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state."

In *St. Paul Ry. Co.* v. *Phelps*, 137 U. S. 528, this court said (p. 536):

> "Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

In *Thornly* v. *U. S.*, 113 U. S. 310, this court said (p 313):

> "Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction."

The embezzlement statutes are to be strictly construed, and no one can be punished under them, however grievous his wrong, who is not fairly comprehended *within the precise language. It is not enough that he may come within the spirit and intent.* 10 *Ency. Law* 997.

In *State* v. *Meyers*, 56 Ohio St. 340 (1897, 6 judges, no dissent), the court construed an embezzlement section of the code which provided that "whoever being charged with the collection, receipt, safekeeping, transfer or disbursement of the public money or any part thereof," converts the same to his own use, or to the use of another, shall be guilty of embezzlement. The accused was the deputy county treasurer, but, at the time of his alleged embezzlement, he was acting as the county treasurer under appointment of the latter by authority of a statute. It was held on demurrer to the indictment that the law applied only to persons "who are charged by law with the performance of the duties or some of them therein mentioned," and as the accused was not so charged by law, but by the treasurer, he was not within the statute because not within its descriptive terms. The court said (pp. 349, 350):

> "But the language of section 6841, 'whoever being charged with the collection,' etc., of the public money, is descriptive of the persons who may be guilty of the offense it punishes and is therefore descriptive of the offense; and, under that fundamental rule of strict construction applicable to all penal laws, a statute defin-

> ing a crime can not be extended by construction to persons or things not within its descriptive terms, though they may appear to be within the reason and spirit of the statute. Persons cannot be made subject to such statute by implication. Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused. *Bishop on Statutory Crimes,* section 194. As said by *Chief Justice Marshall,* in the case of the *United States* vs. *Wiltberger,* 5 Wheat., 76-96: 'To determine that a case is within the intention of a statute, its language must authorize us to say so,' " etc.

To the same effect are the embezzlement cases of *People* v. *Shearer,* 143 Cal. 66, 67 (county physician) and *State* v. *Hubbard,* 58 Kan. 797, 799 (receiver), each holding that the accused was not liable because not within the strict letter of the law.

In *U. S.* vs.. *Long,* 10 Fed. 879, 880, an indictment against a postal employee for embezzlement, the court said:

> "By no grammatical construction, nor by any reasonable intendment, can this section be made to cover the offense of embezzling a letter with valuable contents, such as is charged in this indictment."

In *State* v. *Connelly,* 104 N. C. 794, the court said (pp. 797, 799):

> "If the legislature intended to embrace such public officers [clerks of superior courts, in embezzlement statute] generally, it would, most likely, have done so in plain, direct terms, not leaving its purpose to conjecture and inference. Statutory criminal offenses are not created simply by implication. The purpose to create them must appear, in terms or by necessary implication, clearly to be seen. * * * This may be a serious mistake, but it is not the province of courts to devise further methods and means for suppressing such mischiefs [embezzlements]. They must, and can only, apply the law as they find it prescribed by the legislature."

In *France* v. *U. S.,* 164 U. S. 676, the accused were convicted by the judicial enlargement of the federal statute to suppress lotteries. This court unanimously said (pp. 682, 683):

> "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of paper which depends upon a lottery the drawing of which has not taken place, and which paper purported to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

This section 841 is highly penal and must be strictly construed. Its language is plain, and cannot be extended by implication or construction to include persons or property or acts not clearly and unmistakably within its terms. It has no retroactive effect; but, by its very words, and the universal rule of construction, and the express provisions of the code itself, it applies only to receivers whose possession was acquired after, not before, the code, and only to property the possession of which was acquired after, not before, the code, and only to conversion occurring after, not before, the code. Construed retrospectively, the forfeiture clause is unconstitutional and void, and operates a nullification of the whole section.

This section defines (1) the fiduciaries included, expressly prescribing that it shall apply only to those into whose possession property *may come* after the code takes effect; (2) the property made the subject of embezzlement, expressly restricting it to that property which *may come—"coming"*—into possession after the code takes effect; (3) the ultimate act constituting the offense, but only in general terms and by way of conclusion; (4) the forfeiture, but only in general terms, and without prescribing that it shall include vested rights or claims to costs, charges and commissions; (5) the name of the offense composed of all the constituent elements combined; (6) the maximum fine; (7) the maximum imprisonment; and (8) that both fine and imprisonment may be imposed.

The section is expressly future as to (1) the persons, (2) the property, (3) the possession, (4) the ultimate act, (5) the forfeiture,

(6) the offense, (7) the fine, and (8) the imprisonment. It is indefinite only as to the time of the fiduciary's appointment.

The indictment (R. 1-2) alleges the defendants' appointment as receivers on November 6, 1894, and charges by implication (R. 77) that the money had come into their possession before the code took effect. The evidence fixed the exact date as June 28, 1895 (R. 37). It is essential that the indictment and proof distinctly show that the money came into their possession after, not before, the code became effective, in order to bring them within the enactment.

Rightful possession by virtue of the office or employment of the accused is indispensable, and section 841 specifically describes the character of the possession required as a condition precedent to its operation—a possession which must arise or accrue after the law takes effect, and no other. *It does not act on a possession acquired before the statute was passed.* It is fully satisfied in every part, both as to letter and spirit, by holding that the language applies only to persons and property *coming* or that *may come* into possession in the future—after it has taken effect. The judges below refused so to hold, for the reasons stated by them.

> "And, oftentimes, excusing of a fault
> Doth make the fault the worse by the excuse."

What more "unmistakable expression" of an intention to make a distinction between the past and the future can possibly be found than in the words of section 841? Does the appellate judge require Congress to say in terms, "We hereby intend to distinguish between the past and the future?" Or what is the "unmistakable expression" that he recognizes as such? Is it dependent upon the whim or caprice or prejudice of every judge in every case, and no longer upon the language of the law?

In *Green* v. *U. S.*, 25 App. D. C. 549, the court construed section 838 of the code against embezzlement by warehousemen, commission merchants, etc., and said (p. 551):

> "We take it that this section is to be so construed that the fair and ordinary meaning be given to its terms. We think they are clear and unambiguous."

There is not the slightest doubt or ambiguity about the terms of section 841, and *the judges below have neither pointed out nor sug-*

gested nor even insinuated that there is, if given their fair and ordinary meaning; but by alleged construction, they have added to it a class of persons and property and possession that the law itself wholly excludes, in order to make it fit this case.

Since section 841 has now been in force about five years, and this is the first and only case under it, it is exceedingly improbable that any other ever will arise which will present the point made against the application of the statute in this case. Any future cases will undoubtedly be those in which the persons and property have come into possession since the law took effect on January 1, 1902. The temptation to stretch the law is therefore now removed.

(2) Prospective Effect of May, Come, Into, and Coming, in Section 841.

We have argued and argued in vain in the courts below that this highly penal statute is purely prospective and means just what it plainly says, and no more; that *"may come"* means *"may come;"* that *"coming"* means *"coming;"* that *"shall"* means *"shall;"* and that *"into"* means *into;"* but the judges below have simply held (R. 77-78) that Congress did not intend what it plainly said, that it did not know the sense of its own words, or the rules of grammar, or its own mind or meaning, but that by the terms it used it intended to express the meaning of their antipodes. That the terms used refer only to future events is illustrated by the following:

In *Green* v. *Robinson,* 41 Conn. 470, the court said (p. 471):

> "The result of the question entirely depends on the proper construction of a single clause in the plaintiff's agreement. The promise of the plaintiff is to credit on the defendant's notes any amount he *may receive* from Souls & Co. over and above four hundred and eighty dollars. It seems very clear that the words '*may receive,*' in the connection in which they are used, apply only to the five hundred and forty dollars subsequently received and have no reference to the three hundred and sixty dollars which had previously been paid. The grammatical construction of the language is too obvious to be reasonably questioned, and its ordinary and common sense import appear equally certain."

In *Shoemaker* v. *Smith,* 37 Ind. 122, the court said (p. 128):

> "The several counties are to be held liable for the preservation of so much of the fund as '*may be intrusted*' to them, and for the payment of the annual interest thereon. The language employed cannot have reference to the fund that had already been intrusted to the counties, because it speaks for the future and not for the past. It contemplates a future intrusting of the fund, or some part of it, to the several counties. The words '*may be*' are peculiarly appropriate to express the future and not the past."

In *Johnson* v. *Mon. Nav. Co.*, 32 Pa. St. 153, the court said (p. 156):

> "What then is to be the extent of its operation? Certainly not retrospectively, unless the provisions of the act cannot be sustained otherwise. But to assert this would be idle indeed. Past liability is not touched by the clause. * * * The 'company shall not hereafter be liable for damages which *may be done*' is certainly not the same thing as if it had been said that the company shall not hereafter be liable for damages which *may have been done*. Yet this is the construction contended for. It is neither philologically, nor in common parlance, correct to give to the words referred to, standing in the position they do, a past signification. They are in their connection distinctly future."

In *Durfee* v. *Plaisted*, 38 Cal. 80, 84, the court construed the act of Congress of March 3, 1885, and said:

> "There is no room for doubt that the lands referred to by the language, 'or which *may be designated* for such purposes by the President,' were lands that might thereafter be designated for public purposes by the President."

In Pitkin v. *Aspen*, 3 Colo. App. 223, 227, the court, in construing a statute in which was used the phrase *"may be liable,"* said:

> "The words '*may be*' can only be construed as meaning the future."

In *South Carolina* v. *Gaillard*, 101 U. S. 433, 438, the court construed a statute which referred to certain suits which *"may be in-*

stituted;" and held that this form of expression excluded the idea that such suits had already been instituted. The court said:

> "The tender and deposit of the bills laid the foundation for the authorized proceeding, but did not institute it. This is clear from the language. The bills are to be deposited 'to abide the decision of the court in any proceeding which *may be* instituted,' thus implying that when the deposit was made proceedings had not been instituted."

Section 30, act of April 12, 1902, 32 Stat. L. 97, 98, reads:

> "Shall be due and payable * * * and shall be a lien and charge upon the property of every person who *may die,*" etc.

In re Hotchkiss, L. R. 8 Eq. 643, 649, it was held that a gift to children of the members of a class "who *may die* in my lifetime," did not include the children of a member of such class who was dead at the date of the will.

In *Sanders* v. *O'Callaghan,* 111 Iowa 574, 581, *"may continue"* was held to be purely prospective.

In *Herbert* v. *Gray,* 38 Md. 529, 531, the court held the following statute not to be retrospective, and not to apply to joint notes made prior to its enactment, but only to those made after it took effect from the date of its passage:

> "Any married woman *may be sued* jointly with her husband * * * on any note * * * which she *may have executed* jointly with her husband, and *may employ* counsel and defend such action, separately or jointly with her husband, and judgments recovered in such cases *shall* be liens on the property of the defendants, and *may be collected* by execution or attachment in the same manner as if the defendants were not husband and wife."

The phrase, *"may have executed,"* was held (p. 533) to refer to the time of instituting the suit, and not to the time of the passing of the act, and not necessarily to embrace notes which had been executed before the law was enacted; and therefore prospective construction alone was permissible.

Sec. 3143 R. S. U. S. reads:

"Every collector * * * shall execute a bond for such amount as may be prescribed by the Commissioner * * * conditioned that said collector * * * shall justly and faithfully account for and pay over * * * all public moneys which *may come* into his hands or possession; * * * and he shall from time to time renew * * * his bond, as the Secretary * * * may direct, with such further conditions as the said Commissioner shall prescribe; and he shall execute a new bond whenever required * * * with such conditions as may be required by law or prescribed by the Commissioner," etc.

Sec. 3164 R. S. U. S. reads:

"It shall be the duty of every collector of internal revenue to report within ten days to the district attorney * * * a statement of all the facts and circumstances of the case within his knowledge * * * and which *may come* to his knowledge from time to time," etc.

Is it conceivable that the phrase *"may come"* was used in either of these sections to refer to a past event—in the sense of "may have come" or "might have come?" Is it any more conceivable that it was used in section 841 in a past sense? Under section 3143 R. S. and the condition of the bond prescribed, would the sureties be liable for all public moneys which had come into the collector's hands or possession before that law was passed or the bond was executed? In section 3164 R. S. the future meaning of *"may come"* is sharply brought out—"the facts and circumstances of the case within his knowledge * * * and which *may come* to his knowledge *from time to time.*" Surely, *"may come"* and *"so coming into his possession,"* in section 841, refer to a future event only, *as a condition precedent to the operation of the statute.* Any other construction defies both the law and the language, and sets the will of the court above that of Congress.

In re Birdsall's Estate, 49 N. Y. Supp. 450, the act read (p. 462):

"Such tax shall also be imposed when any person or corporation *becomes* beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of this act."

The court said (p. 463):

> "The act speaks from the time it takes effect, and seems to us very clear and plain that the vesting of the beneficial interest in possession or expectancy, which is the condition precedent to the right to tax, is a future event—an event occurring after the passage of the act, and cannot be held to apply to a beneficial interest already vested in possession or expectancy. This doctrine is clearly recognized in the *Seaman Case*, 147 N. Y. 69. Then again, the verbs, 'shall' and '*become*' and the adverb 'when,' as they are employed in the act, clearly refer to future and not to past, events."

In *Bear* v. *Atlanta Ins. Co.*, 70 N. Y. Supp. 581, the court said (p. 583):

> "The condition of the policy with reference to the building '*becoming*' vacant or unoccupied has reference to the future. It relates to a change in the condition of the property in this respect after the insurance is affected, and not to a condition existing at the date of the policy."

In *People* v. *Cook*, 96 Mich. 368, the statute (p. 370), making the offense a felony, punished every person "who shall solicit * * * a female to enter such a house for the purpose of * * * *becoming* a prostitute." The court held that "*becoming*" referred to a future event, and said (p. 373):

> "Some force must be given to the word '*become*;'" and it is evident that the Legislature did not intend to make the offense complete by the mere soliciting of a female who is already a prostitute, and in a house of ill-fame, to go from that place into another house of like character."

"*To become due*" refers only to the future. *Foster* v. *Singer*, 69 Wis. 392, 394. *Martin* v. *Campbell*, 120 Mass. 126, 130. "*Become due and payable*" is prospective only. *Sibley* v. *Cook*, 3 Atk. 572, 573.

In *State* v. *Mannix*, 9 Ohio Decisions (Reprint) 667, the court said (pp. 667, 668, 670):

> "The statute under which the defendant was indicted was passed on the 17th of April, 1885, and took

effect from and after its passage, and the language of the statute, so far as it applies to this case is as follows:

"'An * * * assignee in insolvency * * * who embezzles or converts to his own use * * * anything of value which *shall come* into his possession by virtue of his employment or appointment as such * * * assignee in insolvency is guilty of embezzlement, and shall be punished' * * * .

" * * * This law only came into existence on the 17th of April, 1885, so that such an assignee in insolvency can only be amenable to the provisions of this law for money which came into his possession as such assignee *after* the passage of the law on the 17th of April, 1885."

The court further said that it was necessary that it should appear beyond reasonable doubt "that *after* the passage of the act 17th April, 1885, referred to, and while continuing as such assignee, the money * * * charged in the indictment, and enumerated in the bill of particulars, came into his possession by virtue of his employment or appointment as such assignee."

The *Mannix* case was a *cause celebre* in its day. The defendant was the assignee of Bishop Purcell, and received about $350,000 under the assignment. He admitted that he had lost $183,000 of this money in Wall street speculation. He kept no books, and destroyed all of his papers relating to his receipts and disbursements. (See 16 *Ohio Weekly Law Bulletin* 197, 212, of September 20, 1886.) At that time there was no law in Ohio against embezzlement by assignees; but the Mannix case was so irritating that on April 17, 1885, an act was passed, chiefly to reach Mannix, and he was immediately indicted under it, but was not convicted, principally because the law applied only to property *"which shall come into his possession,"* and it could not be shown that any of the money which it was alleged Mannix, had embezzled, had come into his possession *"after the passage of the law."* The court simply followed the act, and did not attempt to extend it. Even the State did not deny that the law would not reach the embezzlement of pre-acquired money.

This is the only case that we cited below which the appellate judge (R. 78) admits "covers the particular phase of statutory construction here presented;" and he adds (R. 78) that this excepted

case "is the decision of an inferior court of another jurisdiction, unofficially reported." No attempt is made to show that it announces bad law or grammar. The official report is given above. The decision simply declares the elementary and necessary effect of *"shall come into his possession."* Either it is exactly right or the following decision of its critic is hopelessly wrong:

In *Bank* v. *Berlin*, 26 App. D. C. 218 (Nov. 8, 1905, *per* Shepard, Ch. J.), the question was whether the remedial section 1214 of the D. C. code, concerning the liens of judgments and decrees which *"shall be rendered,"* included a judgment for $426 rendered May 13, 1901—between the dates when the code was passed and when it took effect ten months later. The court answered in the negative. The judge quotes liberally (p. 222) *Lake Co.* v. *Rollins*, 130 U. S. 662, 670, and from (p. 222-223) *Denn* v. *Reid*, 10 Peters 524, 527, and from (p. 223) *U. S.* v. *Goldenberg*, 168 U. S. 95, 102, to show that because there was *no reason* for Congress to make a distinction between existing and future judgments and decrees, gives no warrant or excuse whatever to the court to read retrospective words into the statute in order to make it include the former, and says (pp. 221, 222):

> "The question remaining then is whether the lien operates from and after the passage of the Code in favor of all judgments then in existence as well as in favor of those thereafter rendered? The literal meaning of the words 'from the date when the same *shall be rendered*' limits the lien to future judgments. To hold that they give a lien to final judgments from the date of the enactment is contrary to the grammatical construction and the plain, natural import of the words. There is no other language in the section warranting an inference that those words were intended to have any other than their literal and natural meaning.
>
> * * * * * * * * * * *
>
> "Practically the only ground upon which the argument for going beyond the letter of the statute rests is the want of any apparent reason why the legislature should have made a distinction between future judgments and existing ones. Undoubtedly, the lien given by the statute might wisely and justly have been extended to both classes of judgments, but the courts have no power to interpolate words necessary to ac-

complish that end. They have nothing to do with the motive actuating the legislature."

In the later case at bar, the same judge, referring to the intensely penal statute involved, said (Record pp. 77, 78, 27 App. D. C. 433, 440, May 1, 1906):

> "Words like *may*, must, *shall*, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. * * * It is inconceivable that Congress intended to make a distinction in respect of property * * * dependent upon the time when the same shall have come into * * * possession * * * *. There is no possible foundation in law or morals for such a distinction, and * * * no court would be justified in adopting a construction that would give it recognition."

The judge is most significantly silent as to his own flatly contrary but correct opinion in the *Berlin* case, and also as to the unanswerable authorities therein quoted by himself, as well as to the others herein cited. The reason for his silence is very obvious.

We here repeat part of the language used in declaring the meaning and effect of *"shall"* in a statute, already quoted from *U. S.* v. *Am. Sugar Co.*, 202 U.S. 563, 579:

> **"FUTURE TIME AND PAST TIME ARE DIRECTLY OPPOSITE, AND BY NO INADVERTENCE OR INTENTION CAN WE BELIEVE OR SUPPOSE THAT CONGRESS, HAVING IN MIND THE PURPOSE AND DISTINCTION BETWEEN THE PAST AND THE FUTURE, SHOULD USE LANGUAGE THAT EXPRESSED THE ONE WHILE IT MEANT TO PROVIDE FOR THE OTHER."**

In *Sarlls* v. *U. S.*, 152 U. S. 570, the accused was convicted by the judicial extension of the words "spiritous liquor or wine," used in the statute, to include lager beer. This court unanimously said (pp. 572, 574, 575, 577):

> "To enable us to solve the question we must look to the popular signification of the terms used. * * *

> The reasoning on which such a conclusion is reached excludes the common and popular signification of the words, and finds the meaning of the statute in the fact • • • that the purpose of the statute is to prevent the mischief occasioned by the use of intoxicating drinks.
>
> "We cannot agree with this method of reading a penal statute. The purpose of such a statute is to notify the public of the legislative intent. • • • That intent is • • • to be found by giving to the words the meaning in which they are used in ordinary speech.
>
> "Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by *Chief Justice Marshall*, when, in the case of *United States v. Wiltberger*, 5 Wheat. 76, 96, he said: • • • The temptation to stretch the law to an acknowledged evil is now removed."

U. S. v. *Harris*, 177 U. S. 305, was an action against railway receivers to recover a penalty for a violation of the federal statute against cruelty to animals in transit. The Government in vain cited other statutes and cogent reasons why the word "*company*" should be extended to include receivers. The court unanimously said (p. 308):

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the States and of the United States • • • . But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments. • • • Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act? • • •
>
> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company'. Only by a strained and artificial construction, based chiefly upon a consideration of

the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? * * * The intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The same principles are laid down at some length, and applied in *Johnson* v. *Ry. Co.*, 117 Fed. Rep. 462, 465-469 (C. C. A.), in construing a penal statute relating to railway companies.

In *Dean* v. *Reid*, 10 Peters 524, this court said (p. 527):

"This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where courts have construed a statute most liberally to effectuate the remedy; but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute, at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.

"We are unable to say why the benefits of this statute were given to those who held under deeds proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowledgement of the grantor. In most cases, if not in all, proof by acknowledgement would be deemed more satisfactory than by witnesses; but the Legislature having made a distinction between the cases—whether it was intentional or not, reasonable or unreasonable—the court

are bound by the clearly expressed language of the act."

In *U. S.* v. *Goldenberg*, 168 U. S. 95, this court said (p. 102):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation. • • • No mere omission, no mere failure to provide for contingencies, which it may seem wise to have provided for, justify any judicial addition to the language of the statute."

These words are used in holding that *"shall • • • give notice"* and *"shall pay"*, in a revenue act, refer exclusively to future events, and the case was approved in *U. S.* v. *Am. Sugar Co.*, 202 U. S. 563, 578.

In *Lake County* v. *Rollins*, 130 U. S. 662, this court said (p. 670):

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

Section 841 is only to take effect ten months in the future. It is purely prospective in all of its provisions. *A possession of property to be acquired by a fiduciary after it has taken effect is an express condition precedent to its operation.* Its language cannot include, but certainly excludes, persons and property that had come into possession before its enactment. *"Into"* can never be used with a verb denoting inaction or rest, but only with one indicating action or motion. *"Come"* denotes motion, not rest. *"May"* here expresses the simple future with the element of doubt or condition, often put in the form of *"shall"* with *"if"*. The phrase, *"into whose possession*

*money * * * may come*", necessarily means a possession of money to be acquired in the future. This is made certain by "*coming*," which is here equivalent to and is often used for the infinitive in a purely future sense; and also by the invalidating effect of the forfeiture clause when construed retrospectively; and also by the destructive *ex post facto* effect of the phrase, "*converted or appropriated to his own use*," when read retrospectively instead of prospectively and elliptically. Giving to the words of the act their fair and usual meaning, the law is perfectly plain in every part, and can have no possible application to this case.

So far as words go, there is far more excuse for reading "*converted or appropriated to his own use*" as referring to a past act, than for reading "*may come*" and "*coming*" and "*shall*" as referring to past events; but such readings are foolish, because the terms used refer strictly and only to the future. We simply want the statute read as it reads, and not re-edited as it has been by the judges below.

Suppose that section 1214, construed in *Bank* v. *Berlin*, *supra*, had read, "from the date when the same *may be rendered*,' or "from the date when the court *may render* the same" or "from the date when the same *may come into existence*," etc. Would the decision of the Court of Appeals have been the reverse of what it was? Evidently not, unless the act were highly penal, and the judgment against the accused.

Is it not very certain that if section 841 had been a purely remedial statute, and if the instant case had involved only a money judgment for a few dollars, the Court of Appeals in its opinion would have construed the statute strictly and literally, and (in its own language), according to "*the grammatical construction and the plain, natural import of the words*"? And so construed, is it not certain that it would have held it not to include, but to exclude, persons and property that had come into possession before the law was passed? And not to include the forfeiture of vested rights or claims to commissions, costs and charges? And not to be subject to retrospective construction in any respect? Yet it has been well said that "*there is more in human liberty than in any other question which concerns mankind*," —but not by the judges below.

In *Market Co.* v. *Hoffman*, 101 U. S, 112, the court said (p. 115):

> "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as *Bacon's Abridgment*, section 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."

Whether taken as a whole, or critically analyzed, the language of section 841 and its grammatical construction prove our contention to be sound.

"May" denotes contingency or liability, probability or possibility, doubt or consequence, or condition in a future sense. *Webster's Dictionary.*

The auxiliary verb *"may"* is "prefixed to one of the principal parts of another verb, to express some particular mode and time of the being, action, or passion." It has but "two forms ['*may*' and '*might*'] in respect to tense or time. * * * It is used also, to express doubt, or a consequence, with a future signification; as, 'I *may* recover the use of my limbs, but I see little probability of it.'—'That they *may* receive me into their houses.' *Luke*, XVI, 4. *Churchill's Gram.*, p. 274. In these * * * instances, the potential present is akin to the subjunctive." *Goold Brown's Grammar of English Grammars*, pp. 361, 363, 364.

Greene says:

> "The auxiliary verbs are used to form the modes and tenses of other verbs, and to give to the forms in which they are used the shades of meaning peculiar to their original signification. * * * The auxiliary verbs should be regarded merely as relation words, or words used to show relation of time and mode." *Greene's Analysis*, p. 67.

"Come" denotes motion, and means to move hitherward; to draw near; to approach some person or place indicated. *Webster.* To happen; to approach; to move toward. *March's Thesaurus Dictionary* (see full note p. 180, and elaborate collection under title "Future-Past" pp. 435-436, including *coming, come on, time to come, to come*, etc.).

"Into" denotes motion, and means entrance or passage inwards; the passing from one state or form to another; it comes only after

a verb indicating motion, while *"in"* follows one denoting rest. 16 *Col. Cyc. Webster. March's Thesaurus Dict.* p. 555.

When we speak of property that *may come* into our possession, we necessarily mean property that may move out of the possession of another into that of ourselves at some time in the future. The phrase *"may come into possession,"* or *"into whose possession money * * * may come,"* cannot possibly apply to property already in our possession and therefore at rest, for it requires future motion—the very antipode of rest.

"Coming," in its adjective sense, denotes motion, and means approaching; of the future; especially the near future; the next; as, the coming week or year; the coming exhibition. *Webster.* Approaching. *March's Thesaurus Dict.* p. 181. In its participial sense, *"coming"* is equivalent to the infinitive *"to come,"* and either form may be correctly used, as one pleases. *Brown Gr. of Eng. Gr.* p. 637. *"Property so coming into his possession"* is synonymous with *"property so to come into his possession."*

By *"coming"* property, Congress could not possibly have meant property that had come into possession. It was of easy expression to include persons and property that had come into possession before the law, and to make the act retrospective; but in such event Congress would certainly have made proper provision for commissions, costs and charges which had been previously earned and allowed. Full effect can be given to the statute, as we have said, by applying it only to persons and property that *"may come"* into possession in the future, and it is neither necessary nor permissible for the courts to read into it words of retrospective meaning, as has been done in this case, so as to force it to include those that had come into possession in the past.

"May come" and *"might have come"* are antipodes as to time, and mark the broad distinction between the future and the past, and between property or possession to be acquired in the future, and that acquired in the past. A person into whose possession property had come before the law cannot by any torturing of language be included in a highly penal statute directed solely against a class of persons into whose possession property *"may come,"* who shall convert the property so *"coming"* into their possession. *Courts must take Congress at its word.*

There certainly is no necessary or inexorable reason why Con-

gress should have included in section 841 those fiduciaries into whose possession property had come or may or might have come before the law was passed or took effect, in addition to those into whose possession property *"may come"*; and in view of the fact that we got along very satisfactorily for more than one hundred and five years without any law whatever against embezzlement by fiduciaries (*Viedt* v. *Evening Star Co.*, 19 D. C. 534, 539), and that section 841, as we have said, is new, original, exclusive, complete, and the first legislation ever passed here on this subject, it is far more reasonable to believe that retrospective words were purposely omitted in this section than that they were inadvertently left out. The section certainly shows no indication of the inadvertent or unintentional omission of retroactive language, but quite the contrary, if the rules of law and grammar play any part in its make-up or meaning.

Significance and effect must be accorded to the words of this statute. *"May come,"—"coming,"—"shall fraudulently convert,"—"shall forfeit,"—"shall be deemed guilty,"—"shall be punished,"*— are all literally, strictly, and exclusively future. Since the statute expressly includes only those fiduciaries into whose possession property *"may come,"* and only that property *"so coming"* into possession, it impliedly excludes all other persons and property, especially those that had come into possession before the law was passed. The words used have no technical meaning, nor are they ambiguous. They have but one meaning.—that which is attached to them in their ordinary and popular sense—and they must be so construed.

When we speak of a receiver who *"may come"* into possession of certain property, do we mean one who has come into possession thereof, or is now in possession? When we speak of property that *"may come"* into our possession, do we mean property which has come into, or is now in, our possession? The natural meaning of *"may come,"* in the context, is future only, and these words restrict the act to property coming into possession in the future, and to receivers whose possession shall accrue in the future—that is, after the code takes effect. The words cannot lawfully be extended by the court so as to include preacquired property, or receivers whose possession preceded the code, especially in a statute so highly penal and drastic as this.

A statute which enumerates the persons, property and acts within

its purview, thereby excludes all others. *Johnson* v. *Ry. Co.* (C. C. A.), 117 Fed. Rep. 462, 465, 467, 469. *Expressio unius est exclusio alterius* is a universal maxim in statutory construction. *U. S.* v. *Arredondo*, 6 Pet. 691, 725.

Ability, competency, or power is properly expressed by *"can"*. That *"may come"* is not used in section 841 for *"can come"*, is shown by *"coming"* and the context. A receiver is appointed to take possession of property; and therefore to speak of a receiver into whose possession property *"can come"*, involves here an absurdity, in view of the nature of the office.

The judges below do not deny that the language of this law is plain, but they attain the desired retroactive effect, and extend the act to meet the exigencies of this case, by inserting words that are not now in the section.

In *U. S.* v. *Reese*, 92 U. S. 214, this court said (pp. 216, 219, 221):

> "If Congress has not declared an act done * * * to be a crime against the United States, the courts have no power to treat it as such. * * * It is not claimed that there is any statute which can reach this case, unless it be the one in question. * * * This is a penal statute and must be construed strictly. * * * The words employed must be understood in the sense they were obviously used. * * * We must take these sections of the statute as they are. * * * The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * The language is plain. There is no room for construction."

Had Congress designed section 841 to extend to persons and property that had come into possession before the law, it would naturally and distinctly have said so. It was of easy expression. It is only by interpolating words of retrospective effect that the act can receive the construction given it by the courts below. Practically the only ground upon which the arguments of the judges below for going beyond the letter of the statute rests, is the want of any apparent reason why the legislature should have made a distinction between receivers into whose possession property *"may come"* and those into whose possession property had come, and between property *"coming"* into possession and that which had come into pos-

session. Undoubtedly the law might wisely and justly have been extended to both classes of persons and property, with proper provisions for vested rights or claims to commissions, costs and charges, but the courts have no power to interpolate words necessary to accomplish that end. They have nothing to do with the motive actuating the legislature. *Bank* v. *Berlin,* 26 App. D. C. 218, 222, *per* Shepard, Ch. J., quoted *supra.*

The trial judge, as we have said, inserts the words *"may be"* for *"may come"*, and the appellate judge interpolates (R. 78) *"may have passed"*. The object of each was the same—to extend the statute to fit this case. Of course, the interpolation of *"may have passed"* requires the insertion of *"passed"*, in addition to *"coming"*, for the latter is not responsive to the retrospective expression.

The trial judge also interjected hard labor as part of the punishment under section 841; but as this was of no practical consequence (R. 84), the appellate court struck it out (R. 84-85).

In *Bolles* v. *Outing Co.,* 175 U. S. 262, this court said (pp. 265, 268):

> "The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain it will be construed as it reads, and the words of the statute be given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute was remedial. * * *
>
> "The language of this section when examined seems hardly susceptible of two interpretations, unless certain words which are not found there are treated as interpolated. * * *
>
> "Had Congress designed the extended meaning claimed for these words 'found in his possession', it would naturally have used the expression 'found in or traced to his possession', or 'found to be, or to have been, in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed."

In *U. S.* v. *Eaton,* 114 U. S. 677, this court said (p. 678):

> "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a

> criminal offense; and we do not think the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargerine to omit to keep books and render returns * * * it would have done so distinctly."

In *Beitzell* v. *D. C.*, 21 App. D. C. 49, the court said (p. 61):

> "At any rate, it would seem to be reasonable to presume that if it had been the intention of Congress to make the provisions of the act apply to soliciting agents for the owners of goods beyond the District, that intention would have been expressly declared, and not left to doubtful conjecture."

Since *"may come"* denotes future action or motion, it therefore requires *"into"* and *"coming"*, both of which are found with it in the statute. The trial court's interpolated words *"may be"*, indicate inaction or rest—the reverse of *"may come"*—and, therefore, require *"in"* and *"being"*, neither of which is found in the law, any more than *"may be."* If we read out *"may come"* and read in *"may be"*, we must also read out *"into"* and *"coming"* and read in *"in"* and *"being"*. This is not construction, but creation—judicial legislation.

"May be" generally means *"may hereafter be"*, under the rule against retrospective construction.

The trial judge, in the course of his opinion, holding that *"may come"* means *"may be"* and is retrospective, accurately used this very phrase in its prospective sense, as follows: "It was as much the intention of Congress, by this section, to reach the cases of receivers already in possession of property as it was to reach the cases of receivers who *may be appointed tomorrow* and who *may come into possession of property tomorrow.*" How would *"yesterday"* read in lieu of *"tomorrow"*? *"May come tomorrow"* is sense; *"may come yesterday"* is nonsense. The same is also true as to *"may be."*

"Coming" in its adjective sense refers only to the future or expected. Neither in its participial nor adjective sense can the word be forced to apply to the past in the context. Property that has come into possession is as sharply distinct as language and law can describe it from property coming, or that may, shall, or will come into possession. Pre-acquired and after-acquired property are separate and distinct things, both in law and fact. Where a statute

describes the property intended to be included by plain and unambiguous words of a purely prospective meaning, the court is bound to restrict the words of the law to the future.

In section 841 *"coming"* is used only as descriptive of the property made the subject of embezzlement; and if it be possible to conceive any reasonable doubt that property that *"may come"* into possession is only after-acquired property, this conclusion is intensified —nay, made a certainty—by the subsequent use of *"coming"*, which refers, and can refer, only to the future, and never by any possibility to the past in the context; that is to property which may, shall, or will come into possession after the code, not before; to receivers whose possession may, shall, or will accrue after the code, not before. The act provides that any receiver shall be deemed guilty of embezzlement of the entire amount or value of the money or other property *"so coming"* into his possession and converted or appropriated. How is it reasonably possible to say that this means or includes money or other property which had come into his possession long before the code was passed or even thought of? Is there no distinction between pre-acquired and after-acquired property? Is there no difference between the past and the future?

In *U. S.* v. *Heth*, 3 Cranch 398, the act of May 10, 1800, which the court construed, read thus: "That in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th of June next, be allowed to the collectors of the districts * * * two and a half per centum on all moneys which shall be collected and received by them * * * for and on account of the duties *arising* on goods * * * *imported* into the United States."

It was unanimously held that the collectors were not by this act restricted to 2½ per cent. commission on the moneys collected and received by them after June 30, on account of bonds previously taken for duties arising on goods imported into the United States.

In the separate opinions of the Justices of this court (pp. 407-414) very careful consideration was given to the language of the act, and especially to the time referred to by the words *"arising"* and *"imported"*, each of which of itself was indefinite in this respect; and each was held to be prospective only, and to be read as if the word *"hereafter"* had expressly preceded it, under the rule against retrospective construction.

If that statute was correctly construed—and the case has been

approved time and again—how is it rationally possible to say that section 841 applies to persons and property that had come into possession before it was passed? There was some ambiguity about the statute in the *Heth* case, in the respects stated, else there would have been no controversy; and there was some reason to contend for a retrospective reading of that statute; but there is none whatever as to section 841, for *"may come"* and *"coming"* are in no possible manner indefinite as to time. *They refer to the future or nothing.* In the *Heth* case the Attorney General said that the law was too clearly retrospective for the point to be argued at all; but every member of the court held it purely prospective.

Since Congress, in its use of the verb *come* in section 841, could have used any one or more of four tenses of the potential mood, as well as many other forms of expression, can it be said that its use of *"may come"* was inadvertent? It could have said: Any receiver into whose possession property (1) *may come,* (2) *might come,* (3) *may have come,* (4) *might have come,* etc. Courts must assume that Congress knows the meaning of words and the rules of grammar, especially in highly penal statutes. The use of the present potential *"may come"* to express a conditional or doubtful future event is most common and correct. It is impossible to find any retrospective intent in the language of section 841. This can only be done by interpolating words of retroactive effect which it must be presumed were omitted designedly; but whether designedly or not is immaterial, since the necessary words are not there. The judges below concede that the intention of Congress which they ascribe to the act *is not found in its language,* but in considerations entirely *dehors* the words of the law. This is not construction, but creation in the most emphatic and pronounced sense.

Hundreds upon hundreds of instances appear in R. S. U. S. and the later acts of Congress of the use of *"may"* in the future sense. The internal revenue laws alone, as collated in 3 *Fed. St. Ann.* 556-807 (1904), show more than 200 such examples.

There never has been a single instance in the books of law, literature, lexicography, logic, language or philology, of the use of the simple auxiliary *"may"* in the past sense, until this case. The thing is impossible from any rational standpoint. The same is true of *"coming"* without the copula. No amount of arguments or reasons

of the judges below can change the plain meaning or grammatical construction of section 841.

Naturally—indeed necessarily—there is no other case in the books in which a penal statute, directed against persons *into* whose possession property *may come* or *shall come* in a certain character, who shall convert to their own use the property so *coming* into their possession, has ever been attempted to be applied to persons and property that had come into possession before the law was passed. The thing is incomprehensible and impossible. The instant case stands absolutely alone as a specimen of statutory misconstruction. It is *sui generis*. Judicial legislation in criminal cases is not uncommon, but of the many instances that we can find, none equals this in its bald perversion of law and language.

(3) Prospective Effect of Shall, in Section 841.

"May come" answers to *"shall come"* with *"if"*. Had section 841 begun with *"if"*, it would have continued with *"shall come"* instead of *"may come"*. This form of expression is used in some other sections of the code, and in the repealed embezzlement law of 1878. Section 841 can be remodeled and the exact prospective meaning preserved as follows: *If* any receiver shall fraudulently convert to his own use any money of another which *shall come* into his possession, etc. Authorities on the meaning and effect of *"shall"* in statutes are therefore in point. *"Shall"* itself is used four times in section 841.

Section 1 of the act of Feb. 4, 1878, carried forward in enlarged terms as section 833 of said code provided:

> "If any officer * * * in the service of the District of Columbia * * * shall embezzle or wrongfully convert to his own use * * * any money * * * belonging to said District * * * which *shall come* into his possession * * * he shall * * * be punished" by fine or imprisonment or both.

Code D. C. section 834 is section 2 of the act of Feb. 4, 1878, carried forward, and reads:

> "If any agent * * * shall wrongfully convert to his own use * * * anything of value which *shall come* into his possession * * * he shall be deemed

guilty of embezzlement, and shall be punished" by fine or imprisonment, or both.

No attempt was ever made to apply the act of 1878 to an officer or agent into whose possession the property alleged to have been embezzled had come before the law was passed, though embezzled thereafter.

Code D. C. section 48 relates to money collateral which *"shall be deposited"* under police court proceedings, and provides that "any person * * * who shall wrongfully convert to his own use" the same "shall be deemed guilty of embezzlement", and shall be punished by fine or imprisonment or both. This section also uses the terms "may give,"—"may be apprehended,"—may be,"—"may be deemed,"—"may * * * commit"—"may be adjudged,"—"may be called," etc., in the future sense. It is under a chapter totally different from that under which section 841 appears, though the appellate judge states (R. 77) that "the chapter of which this section [841[forms a part undertakes to define and punish every species of embezzlement." Nearly 800 sections and 17 chapters intervene between sections 48 and 841. The statement is otherwise incorrect.

In view of their decision in the *Berlin* case, *supra*, and that in the case at bar (R. 77-78), how would the judges below construe the *"shall be deposited"* of section 48? Would they read in *"has been deposited"* Because the section is intensely penal, the question must be answered affirmatively; yet we cannot see the difference in effect between the *"shall be rendered"* of the *Berlin* case, under section 1214, and the *"shall be deposited"* of section 48, so far as time is concerned.

Both judges below say, almost in terms, that if section 841 had read *"shall come"* instead of *"may come,"* this would not have changed their conclusions. The trial judge quotes as his sole authority a case construing *"shall come"* in a purely remedial statute; and the appellate judge quotes the embezzlement section 833 of the code using *"shall come into his possession"* (R. 77), and admits (R. 78) that the *Mannix* case, *supra,* (*"shall come into his possession"*), is in point.

Undoubtedly, if *"may come"* and *"coming"* are retrospective and refer to the past, then *"shall come"* is also retrospective and denotes the past. *English grammar is thus completely reversed.*

During the course of the opinion, fully supported by authorities cited, in the case of *Jones* v. *Stockgrowers Nat. Bank,* 17 Colo. App. 79, the court said (p. 85):

> "Here there are no qualifying words, although it would have been easy for the legislature, if it had intended that the act should apply to existing judgments, to have clearly manifested such intent by the simple insertion of the words '*or have been*' after the words '*shall be*' in the extract which we have here just quoted."

The cases are unanimous to the point that a statute, directed against any receiver into whose possession property *"shall come,"* who shall convert to his own use the property so *"coming"* into his possession, has no application whatever to one into whose possession the property alleged to have been embezzled had come before the law was passed or took effect. Such an act has no retroactive effect whatever, but is prospective only, and sharply restricted to persons and property that may come into possession in the future. It applies exclusively to future matters and events. The necessary effect of *"shall"* is directly so defined and applied in the following cases, the operative words in each being given:

U. S. v. *Burr,* 159 U. S. 78, 87 (shall be levied, and shall be exempt. *U. S.* v. *Goldenburg,* 168 U. S. 95, 102 (shall give notice, and shall pay). *National Sewing Machine Co.* v. *Wilcox & Gibbs Sewing Machine Co.,* 74 Fed. Rep. (C. C. A.) 557, 559 (shall be). *Murphy* v. *McKeon,* 53 N. J. Eq. 406, 412 (shall die). *Giles* v. *Giles,* 22 Minn. 348, 349 (shall be deserted, and may bring). *Beard* v. *State,* 74 Md. 130, 133 (shall keep). *Johnson* v. *Johnson,* 52 Md. 668, 670 (shall be instituted, and may be commenced, and shall take place). *Meadowcraft* v. *People,* 163 Ill. 56, 78 (embezzlement by insolvent banker who shall receive deposits which shall be lost to the depositor). *Chapman* v. *Holmes,* 10 N. J. L. 20, 26 (shall, and will). *Stisser* v. *Ry. Co.,* 32 N. Y. App. Div. 98, 101 (shall not be used in constructing). *Evans* v. *Page,* 5 A. & E. (N. S.) 767, 772 (shall be deemed). *In re Tuller,* 79 Ill. 99, 107 (a marriage shall be deemed a revocation of a prior will). *Dewart* v. *Purdy,* 29 Pa. St. 113, 117 (shall have been made). *In re Schedel's Estate,* 73 Cal. 594, 598 (shall have died). *Porritt* v. *Porritt,* 16 Mich. 140, 141 (shall have become). *Wheadon* v. *Gorham,* 38 Conn. 408, 412 (shall have,

and shall have levied). *Alden* v. *City of Newark*, 40 N. J. L. 92, 96 (shall have been given). *People* v. *Peacock*, 98 Ill. 172, 176 (unpaid taxes shall bear interest). *People* v. *Green*, 58 N. Y. 295, 301 (shall accept an office, and shall be deemed thereby to have vacated his office, do not apply to an office held when the act was passed). *Northwestern Ins. Co.* v. *Seaman*, 80 Fed. Rep. 357, 358 (shall hereafter be appointed, and may be a member). *Humbolt* v. *Christopherson*, 73 Fed. Rep. (C. C. A.) 239, 247 (shall exercise, and shall become). *Dugger* v. *Mechanic's Ins. Co.*, 95 Tenn. 245, 251 (are and shall be null and void). *City Ry. Co.* v. *Citizens R. Co.*, 166 U. S. 557, 564, 565 (shall have power, and shall be submitted, and shall be approved). *Perkins* v. *Perkins*, 7 Conn. 558, 563, (shall be brought). *In re Strawbridge*, 39 Ala. 367, 375 (shall be exempted). *Thomas* v. *Courtney*, 1 B. & A. 1, 8 (shall and will release).

In re Birdsall's Estate, 49 N. Y. Supp. 450, 462, 463 (shall be imposed. *State* v. *Mannix*, 9 Ohio Decisions (Reprint), 667, 668 (embezzlement by assignee of property which shall come into his possession). *Ohio Bank* v. *Berlin*, 26 App. D. C. 218, 220 (from the date when the same shall be rendered). *U. S.* v. *American Sugar Co.*, 202 U. S. 563, 578, 579 (shall continue, and shall remain, and shall receive, and shall be admitted).

In *Indianapolis Ry. Co.* v. *Kercheval*, 16 Ind. 84, the court said (pp. 88, 90):

> "The amendment applies only to such animals as '*shall be*' killed. '*Shall be*' clearly indicates the future, and not the past. There is nothing in the amendment which indicates, so far as we can discover, an intent on the part of the Legislature to make it retrospective and embrace animals previously killed. * * * We think, both on principle and authority, it should be held to be prospective only, and not applicable to animals killed before the act took effect."

This case was cited in *Shoemaker* v. *Smith*, 37 Ind. 122, 128, already mentioned, as authority for holding that *"may be intrusted"*, in a statute, "cannot have reference to the fund that had already been intrusted to the counties, because it speaks for the future and not for the past. It contemplates a future intrusting of the fund, or some part of it, to the counties."

If *"shall"* is thus construed in purely civil and remedial statutes,

it should at least be as strictly construed in highly penal acts; but the judges below have flatly reversed the rule of strict construction of penal statutes, and that against retrospective construction, in their complete renactment of section 841, and their intense anxiety to make a law to fit this case. We have abiding faith in our contention that in their exceeding zeal they have utterly misconstrued this law. Antipodes of tense or time must remain so; no judge has the right to reverse them in construing a statute, on the common but mistaken assumption that his will is the legislative will.

(4) Retrospective Construction of Section 841 Prohibited.

(1) In the absence of compulsory language to the contrary in the acts themselves, all statutes "are construed as operating only on cases and facts which come into existence after the statutes were passed." *Endlich Inter. Stat.* 271. By this rule, even in the absence of its compulsory language requiring a purely prospective construction, section 841 is properly construed as operating only on a possession which comes into existence after its enactment. All of the elements and facts necessary to make a case within its purview, must arise after it took effect.

It is idle indeed to say that the words of section 841 are so clear, strong and imperative, that no other than a retrospective meaning can be annexed to them, or that the intention of the legislature cannot be otherwise satisfied; but, on the contrary, they are so clear, strong and imperative that no other than a prospective meaning can be annnexed to them, and the act can be given full force and effect, as we have said, by applying it exclusively to after-possessed fiduciaries and after-acquired property, and the intention of the legislature can thus be fully satisfied. The law includes, and was clearly intended to include, only those fiduciaries into whose possession property *"may come"* who shall fraudulently convert to their own use the property so *"coming"*. No enlargement of its language is necessary. The time when possession is acquired is an exp[illegible] condition precedent to its operation, and whether reasonable or not is no proper concern of a court.

In *U. S.* v. *American .Sugar Co.*, 202 U. S. 563, this court said (pp. 577, 579):

> "We are to remember there is a presumption against retrospective operation, and we have said that words in

> a statute ought not to have such operation 'unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied'. * * * We cannot suppose that, if Congress intended to give retrospective operation to the act, it would have used the words that expressed the contrary."

Such is the settled doctrine of this court. *Chew Heong* v. *U. S.*, 112 U. S. 536, 559. *U. S.* v. *Burr*, 159 U. S. 78, 82. *U. S.* v. *Heth*, 3 Cranch 398, 413.

In the *Heth* case it was further said (p. 413): "This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties, or will affect their antecedent rights, services, or remuneration." Here, under the forfeiture clause of section 841, the accused *"shall forfeit all right or claim to any commissions, costs, and charges"* on the trust fund, which commissions, etc., in this case amounted to nearly $10,000 before the law was passed (R. 36).

(2) Construed retrospectively to include and forfeit all vested rights or claims to any commissions, costs and charges earned and allowed before the code, section 841 is unconstitutional and void; and this furnishes an additional reason against such construction. *U. S.* v. *Louisville Canal Co.*, 4 Dill. 601, 611. *Bartlett* v. *Ball*, 142 Mo. 28, 36. *Southwestern Co.* v. *McBride*, 185 U. S. 499, 503.

(3) The fact that the code is expressly limited to take effect in the future, also affords a powerful reason against a retrospective construction. In *Dewart* v. *Purdy*, 29 Pa. St. 113, the court construed a statute relating to the partition of real estate in any court wherein a valuation *"shall have been made"* of the whole or parts thereof, and said (p. 117):

> "Nothing short of the most indubitable phraseology is to convince us that the legislature meant their enactment to have any other than a prospective operation, and when they fixed a future day for it to take effect they stamped its prospective character on its face. * * *
>
> "This phrase, *'shall have been made'*, is an instance of the future perfect tense. It contemplates a valuation perfected, but perfected in the future, and the future of this statute was all subsequent to a specified date.

Had it been repealed before that date, it would have had no future existence, and no operation whatever. Though not repealed, it must not have a construction that would give it effect during the period of its suspended animation, for this were to violate the will of its creator.

"Giving then to the words before us their genuine grammatical meaning, we hold them applicable not to a valuation made after the enactment of the law but before it took effect, but only to valuations made after the law went into operation; and thus construed, the statute commences for every purpose *in futuro*, as Blackstone says all laws should do.

"It follows that this case is not within the purview of the new enactment."

The principles above quoted are well settled as to statutes limited to take effect *in futuro*. *Jackman* v. *Garland*, 64 Me. 133, 136. *Charles* v. *Lamberson*, 1 Iowa 435, 442. *People* v. *Wayne*, 37 Mich. 287, 290. *Andrews* v. *Ry. Co.*, 16 Mo. App. 299, 305. *Harding* v. *People*, 10 Colo. 387, 392. *State* v. *Musmore*, 14 Wis. 163, 174. *Paddon* v. *Bartlett*, 3 A. & E. 884, 895.

(4) "It is not enough that the language is general enough to cover past transactions to justify a retroactive construction. Every reasonable doubt is resolved against a retroactive operation of the statute." *Stewart* v. *Vanderwort*, 34 W. Va. 524, 530. *Dyer* v. *City*, 88 Me. 140, 143, 145. *Berdan* v. *Van Ruper*, 16 N. J. L. 7, 10, 14. *State* v. *Thompson*, 41 Mo. 25, 26, 28. *Finney* v. *Ackerman*, 21 Wis. 268, 270. *White* v. *Crawford*, 84 Pa. St. 433, 436. *Eddy* v. *Morgan*, 216 Ill. 437, 448.

A statute of South Carolina requiring sheriffs, at the expiration of their term of office, to turn over books, papers, writs, etc., and executions *levied*, upon which sales had not been made, was held not to include executions already levied by the sheriffs in office prior to the statute, as it does not extend to such sheriffs. *Osborne* v. *Huger*, 1 Bay 176, 195.

Act 22 and 23 Vict. provides that "when a trustee, executor or administrator *shall not* by some instrument creating his trust, be expressly forbidden" to invest the trust funds in certain securities, he *shall not* be liable for loss resulting therefrom. This statute was held prospective only, and to have reference exclusively to trustees, executors, and administrators whose appointments were made and

funds received subsequent to its enactment. *Re Miles' Will*, 27 Beav. 579, 582.

The Virginia act of 1787, as to possession of slaves, does not apply to a possession acquired before it took effect. *Turner* v. *Turner*, 4 Call. 234, 237.

In *Dugger* v. *Mechanics Ins. Co.*, 95 Tenn. 245, the contention was that the statute applied to existing policies, but the court replied (p. 251):

> "The contention of the defendant that this statute is retrospective rests alone upon the use of the verb '*are*' in the clause 'all stipulations in such policies to the contrary *are and shall be* null and void.' We think to adopt the view of defendant the court would depart from the well-established rule of construction above cited, and would impose upon the act as a whole a strained and unnatural meaning."

In *United Mines Co.* v. *Hatcher*, 79 Fed. Rep. 517 (C. C. A.), the court, construing a lien law, said (p. 520):

> "The amendment of 1895 must be held to have a prospective operation only, and to be applicable only to leases made after its enactment."

In the two following cases the words stated were held to apply only to future events:

> *U. S.* v. *Starr*, Hempst. 469, 471 (all crimes committed.)
>
> *Prince* v. *U. S.*, 2 Gall. 204, 209 (captured and brought into the United States. *Nova constitutio futuris formam imponere debet, et non preteritis.*)

When Congress means an act to be both prospective and retrospective, it almost invariably uses specific words to express that intention. This is especially true in statutes using *"may"*. See, for examples, R. S. U. S. sections 3455, 3462, 3464, 3410, 3444, 3450, 1892, 1894, 5540, 5543, 5546, 5549, 2461, 1041, 3369; act of April 12, 1902, section 3, 32 Stat. L. 97, 98; act of June 27, 1902, section 3, 32 Stat. L. 406; act of March 1, 1879, section 11, 20 Stat. L. 342.

In *Eddy* v. *Morgan*, 216 Ill. 437, the court said (p. 447):

> "The rule of liberal construction is never carried to the extent of giving the act retrospective effect unless there is something in the act itself which indicates the intention so to do."

What is there in section 841 itself to indicate such an intention? Neither judge below found anything whatever; but the trial judge resorted to the *"no reason"* argument, and the appellate judge to the same argument, and to other sections and considerations entirely *dehors* the act, in order to force such effect.

(5) Unconstitutionality of Section 841 Construed Retrospectively.

(*a*) There is nothing in or out of section 841 to warrant a prospective construction of some of its provisions and a retrospective construction of others. If pre-possessed receivers and pre-acquired property are included, then previously vested rights or claims to commissions, costs and charges must also be included. Concededly (R. 77) the act of conversion must be prospective; yet the language of the law as to it is just the same in words or effect as that concerning the persons, property, forfeiture, offense, fine and imprisonment. It would simply be judicial juggling with this statute to construe it to include persons and property that had come into possession before it was passed, but to exclude rights or claims to commissions, etc., which had vested before its enactment.

By reason of its forfeiture clause, the lower courts' retrospective construction of section 841 renders it unconstitutional and void. The law cannot be valid unless it be restricted to what it plainly says—persons and property that may come into possession after the code takes effect. Read according to its plain terms and intent, the statute is entirely free from the constitutional objections to which a retrospective construction necessarily subjects it.

In the case at bar, the indictment charges that the money alleged to have been converted came into possession before the code was passed, at some unstated date. The evidence fixes this date as June 28, 1895. (Testimony of Dr. Young, R. 37.) This was nearly six years before the code was passed, and almost seven years before it took effect, as we have said. The proof (Auditor's Reports, R. 35-37) further shows that the commissions, costs, and charges on the said money amount to $10,070.82, and that of this sum nearly $10,-

000.00 was adjusted and allowed under various orders of the court before the code was passed. By the judgment in this case establishing the alleged conversion, *the plaintiff in error forfeits "all right or claim to any commissions, costs and charges,"* on the said money, if section 841 be valid as applied to the instant cause. These commissions, costs, and charges were vested rights of the accused at the time the code was passed, and Congress was without power to forfeit them, if it has included pre-acquired property rights under section 841. This the lower courts say Congress has done, and they hold that the act includes money which had come into possession on June 28, 1895. Applied to vested property rights, as in the case at bar, section 841 is unconstitutional and void.

The forfeiture necessarily follows the conversion; and hence the act is in effect a bill of attainer which confiscates one's property. The forfeiture is inflicted summarily and without due process of law. The statute does not otherwise provide to whose or to what use the forfeiture shall inure; and therefore, as it must accrue to the United States that enacted the law, and as this use must be public, the result is to take private property for public use without just (or any) compensation.

If the law applies without distinction to both pre-acquired and after-acquired property rights and is unconstitutional and void as to the former, for the reasons stated, or any of them, then it is equally void as to the latter, for the same reasons; but if it applies only to the latter, and only to commissions, costs, and charges arising after—not before—the law, then it is valid. The section cannot be constitutionally applied to money which came into possession on June 28, 1895, so as to operate a forfeiture of almost $10,000.00 in commissions, costs and charges thereon, which had lawfully vested before the statute was passed, or the alleged conversion occurred. The act must apply in all of its details, or not at all. If any one of its provisions be unconstitutional as applied to pre-acquired property rights, the court cannot cut it out by construction, in order to meet the exigencies of the particular case. Many statutes are valid when construed prospectively, but invalid retrospectively. Indeed, it may be safely said that the Constitution itself is the most potent cause of the rigid rule that requires every statute to be construed prospectively, unless there be no escape from retrospective construction. The courts below have applied this rule reversely to the in-

stant case, with disastrous results. Construed properly, that is, purely prospectively, and restricted to after-acquired property rights, the act is valid; but construed improperly—or rather re-edited, revised, recast, and re-enacted—that is, retrospectively, and extended to pre-acquired property rights, the law is invalid; and, as the latter construction was adopted and enforced in the present case, the judgment must fall.

Due process of law means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of the right of life, liberty or property. *Pennoyer* v. *Neff*, 95 U. S. 714, 733. *Hargar* v. *Reclamation District*, 111 U. S. 701, 708. A statute which operates to take the private property of one person, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the federal constitution. *Mo. P. Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417. The denial of any vested property right by a constitution or statute subsequently adopted, is deprivation of property without due process of law. *Houston* v. *Texas*, 170 U. S. 243, 261. The legislature cannot summarily forfeit property innocent in itself, by way of penalty or punishment for its wrongful use. *McConnell* v. *McKillip*, 65 L. R. A. 610, 615 (Neb. 1904). Congress cannot deny to temporary or permanent residents of the District of Columbia the equal protection of the laws; nor arbitrarily take away their real or personal property, nor their right to pursue any legitimate trade, calling, or profession; as all of the constitutional guaranties of life, liberty, and property are equally for their benefit as for persons residing in the States. *Lappin* v. *D. C.*, 22 App. D. C. 68, 76. In *Building Association* v. *Fiske*, 20 App. D. C. 514, 520, the court held that code section 692, providing that premiums to be charged by building associations organized under the code, shall not be deemed usurious, is not retroactive, and cannot constitutionally apply to a right to redeem which existed before the code took effect, although it arose after the code was passed. *Endlich Inter Stat.* Sec. 271. *Wade Retroactive Laws*, Secs. 156-197. *People ex rel. McPike* v. *Van De Carr*, 178 N. Y. 425, 428. In *Wynehamer* v. *People*, 13 N. Y. 378, 382, 406, 428, 447, 458, 459, 486, 487, a statute authorizing the summary confiscation and destruction of intoxicating liquors was declared void, as violating the provision of the constitution which declares that no person

shall be deprived of life, liberty, or property without due process of law. It was held that the legislature might constitutionally prevent the future manufacture or importation of such liquors. But it was further held that, inasmuch as the act did not discriminate between such liquors as were possessed when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and did not warrant any defense based on that distinction, it could not be sustained in respect to any liquor, whether owned at the time the act took effect, or acquired subsequently.

In *Fletcher* v. *Peck*, 6 Cranch 87, 138 *Chief Justice Marshall* said:

> "A bill of attainder may affect the life of an individual, or may confiscate his property. * * * The legislature is, then, prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment."

Applied, as in this case, to pre-acquired property rights, section 841 confiscates all of the accused's property in the commissions, costs, and charges, which vested before the law was passed; and hence it is, in effect, a bill of attainder. The accused's whole vested estate in the commissions, costs, and charges, is, by this statute, as construed by the courts below, forfeited absolutely, and "seized for a crime which was not declared, by some previous law, to render him liable to that punishment." Congress is prohibited from passing such a law.

In *Turner* v. *Turner*, 4 Call. 234, the court said (p. 237):

> "A legislative interpretation, changing titles founded upon existing statutes, would be subject to every objection which lies to *ex post facto* laws, as it would destroy rights already acquired under the former statute, by one made subsequent to the time when they became vested—a power to be deprecated, as oppressive and contrary to the principles of the constitution."

It is very certain that if Congress had intended to deprive fiduciaries of the commissions, costs and charges due and owing to them when the act was passed or took effect, and to forfeit all vested rights or claims to such commissions, etc., it would have used appropriate

language to express that intention, and would necessarily have made some provision for the disposition thereof; otherwise the law must be void.

In *Southwestern Co.* v. *McBride,* 185 U. S. 499, the court construed the Curtis act, making it unlawful by section 16 for any person, after the passage of the law, to claim, demand, or receive for his own use, or the use of any one else, any royalty on coal, or any rents on any lands or property of certain Indian tribes or nations in the Indian Territory, or for any one to pay to any individual any such royalty or rents. Section 18 made the violation of the act a misdemeanor. The sole question presented and decided was whether or not this statute was retrospective so as to include royalties or rents due and payable when the act was passed. The court quotes section 16 in full and holds that it is prospective only, as did the court below (43 C. C. A. 652, 104 Fed. 473). The court also adopts the reasoning of the court below, and quotes with approval from that opinion. The court says (pp. 503-504):

> "The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its acts will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the act, it would have used appropriate language to express that intention, and would necessarily have made some provisions for the disposition of such royalties. But it is clear from the language of the act that it does not deal with royalties already paid, or already due and owing to lessors under leases for coal already mined. * * * Congress, by the Curtis Act, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act."

Did Congress, by section 841, attempt or intend to interfere with or divest the rights of receivers to costs, charges, and commissions

vested in them when the code was passed? If not, then it neither attempted nor intended to include pre-acquired property or receivers already in possession. Here these costs, charges, and commissions, vested when the code took effect, as we have seen, amounted to nearly ten thousand dollars (Auditor's Reports, Schedules A., R. 36).

The appellate judge recognizes the invalidating effect of his retrospective construction on the forfeiture clause. He says (R. 84) that the forfeiture "is not part of the punishment * * * of the offense", but "if effective" is a matter for the chancery court. There is no need for the "if effective" under an exclusively prospective construction, as there can be no question of the validity and effectiveness of the forfeiture clause so read. It is the court, not Congress, that creates the invalidity.

(*b*) The forfeiture clause construed retrospectively being unconstitutional and void, operates to nullify the entire section 841, because it is a single section complete in itself, and has no parts capable of separation within the meaning of the rule which permits the court to enforce the good and reject the bad. To cut out the forfeiture clause is to limit by construction, not by separation. This point was fully considered in *Baldwin* v. *Franks*, 120 U. S. 678, and the cases therein cited and reviewed, and the court said (p. 685):

> "To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute [*R. S. U. S.* Sec. 5519] considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. * * * A single provision which makes up the whole section, embraces those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation."

(*c*) Even considering section 841 as having parts, the rule cannot apply because all are so dependent, and so mutually connected with the forfeiture and each other, and are so indissolubly associated and interwoven in the law, that they were intended as a

whole, and, if all could not be carried into effect, Congress would not have passed the act as it would read with the forfeiture clause out. Indeed, so closely conjoined are the provisions of the law that there is not even a semi-colon, still less a colon or period, between the first and last words of the section, but commas are the only punctuation marks used.

With the forfeiture clause out because unconstitutional and void, what is then left makes it plain that the section would not have been enacted in the mutilated form. The maximums of the fine and imprisonment are left out of all proportion. This is made certain by reference to other sections which contain no forfeiture clause, and especially by an examination of the former embezzlement law of 1878, which had no forfeiture clause, but prescribed a maximum fine of five thousand dollars, and a maximum imprisonment of five years, or both. A comparison of section 841 with other and former laws renders it quite clear that, with the forfeiture clause eliminated, the maximum fine would have been not less than ten thousand dollars, in view of the fiduciary character of the persons included in the act. The rule is, that unless Congress would have passed the act with the same fine and imprisonment that it now prescribes, and in all other respects in the very form it would have if the forfeiture clause had been omitted, then the unconstitutionality of the forfeiture clause destroys the whole section; and this, too, without in any manner ignoring the principle that an act unconstitutional in part may stand as to the valid part; and also applying to a single section the rule applicable to a law of more than one section. *Poindexter* v. *Greenhow*, 114 U. S. 270, 304. *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, 635, 637.

This court cannot say that Congress would have passed section 841 as it would read with the forfeiture clause out; nor can the court read out of the section the unconstitutional forfeiture clause, which Congress inserted, "for the purpose of bolstering up its constitutionality." Section 841 must be construed retrospectively in order to include prior-possessed receivers and pre-acquired property; but such construction necessarily shows the invalidity of the forfeiture clause, and this leads inevitably to the conclusion that the law was intended to be purely prospective and constitutional—in other words, that Congress meant just what it plainly said, and no more.

(*d*) Construed and enforced according to its simple, plain, and unambiguous terms, and applied only to after-acquired property or possession, and to commissions, costs, and charges, non-vested at the time the law took effect, section 841 is entirely valid. Here the difficulty arises from the action of the lower courts in applying the law to a case foreign to both its letter and spirit. The vice lies not in the law, but in its application. We endeavor to show that the act has no application to this case; and what we have already said has been stated with this purpose in view; because it must be assumed that Congress intended to pass a constitutional law and that it should be enforced as passed, and not otherwise—that is, constitutionally and not unconstitutionally.

Let us add that, in determining what persons and property are made subject to section 841, there is no question of *ex post facto* law. Every *ex post facto* law is retrospective; but every retrospective law is not *ex post facto*. Technically and properly so-called, *ex post facto* laws are criminal only; retrospective laws are both civil and crimnial. The former refer only to the prior fact or act made a crime; the latter may refer to any prior or existing fact, act, matter, state, or thing whatsoever, whether civil or criminal. We shall see hereafter that in so far as the trial court admitted evidence of many alleged acts of conversion prior to the code, and as far back as 1897, it gave an *ex post facto* effect to section 841; but this is a matter very different from the persons and property made the subject of the law. With respect to property, a statute which deprives a man of his estate, or any part of it, for a crime which was not declared to be an offense by any previous act, is void. *Fletcher* v. *Peck*, 6 Cranch 87, 138. With respect to liberty, the Constitution forbids the deprivation of liberty of action as well as of person. *Lochner* v. *New York*, 198 U. S. 45, 53.

We therefore submit that section 841, construed retrospectively and as so applied in this case, is unconstitutional and void. It seems to us that this effect of a retrospective construction and application makes it certain that the statute is prospective only, and has no application to the instant case.

(6) Opinions of Inferior Judges on Section 841.

A most powerful argument against the construction given to section 841 by the judges below is found in their own labored opinions,

which expose the fatally defective reasons on which they proceed. Nothing is more difficult in law or logic than an attempt to dissipate a self-evident proposition. The impossible still remains impossible. Language relating only to future events cannot be forced to apply to past events, unless courts can usurp the functions of Congress.

Section 841 applies by its terms or letter only to a fiduciary into whose possession property *"may come"*, who shall convert to his own use the property *"so coming into his possession"*. A receiver into whose possession the property alleged to have been embezzled had come before the statute was passed or took effect, is not within the strict terms or letter of this law, and not necessarily within its spirit. Full force and effect can be given to the act, as we have said, by applying it exclusively to persons and property that may come into possession in the future. It cannot be extended to include any person or property not clearly, unmistakably and strictly within *both its very letter and spirit—not either, but both;* and the spirit of the law is to be found in its letter—not in matters *dehors*.

The trial judge simply re-enacted section 841 to include persons and property that had come into possession before the code was passed or took effect, for three reasons, viz: (1) Because there was *no reason* for Congress to exclude them; (2) because Congress did not know the meaning of its own words and the rules of grammar, but meant *"may come"* to mean *"may be"*; and (3) because Congress intended to include them. He ignores the fact that *"may be"* forces out *"into"* and *"coming"*, and he also overlooks some other very material matters. He himself used—perhaps inadvertently but certainly accurately—the very words of the statute (as we have said) in the identical and purely prospective and exclusive sense in which they are there used—"who *may come* into possession of property *to-morrow*". He used the phrase naturally and easily to mean *exactly what he was then saying Congress did not use it to mean.* Is he or Congress right? Both cannot be.

As his sole authority, the trial judge quotes from a case construing an act enlarging the rights of married women; but it is well settled that statutes enlarging the rights of married women are enabling acts, and are to be liberally construed. *Wills* v. *Jones*, 13 App. D. C. 492, 495. *McCarthy* v. *McCarthy*, 20 App. D. C. 202, 203.

Section 841 is not a remedial, but an intensely penal statute, and is not the subject of liberal, but of strict, construction.

In *Chicago Ry. Co.* v. *People*, 216 Ill. 164, the court said (p. 171):

> "Penal statutes are, by well settled principles of law, to be strictly construed, and matters and things which are not clearly included cannot be brought within the operation of such statutes by mere construction."

The trial judge applied to section 841 the rule of liberal construction applicable to married women's acts; but this law and the married women's acts represent extremes of penal and remedial legislation, of strict and liberal construction, of criminal and civil statutes. To construe the former by the rules governing the latter is to ignore the established principles of statutory construction. It is grave error; yet the trial judge reversed the civil and criminal rules of construction, and applied the former to section 841. He went still further, for he constructed and created a new law by reading out *"may come"* and reading in *"may be"*, and then forcing a retrospective meaning of the latter. When you read out *"may come"* and read in *"may be,"* the law of the English language requires you to go still further; for *"into"* and *"coming"* must also go out, as we have said, and be replaced by other pertinent words—*"in"* and *"being"*. The result is certainly creation, not construction. You cannot say: Any receiver *into* whose possession property *may be*, who shall convert the property so *coming*. The allegations of the indictment (R. 1-2) in this case, as we have seen, are that the defendants were appointed as receivers on November 6, 1894 (R. 31), and that their possession was acquired at some unstated date before the code, which date the evidence (R. 37) fixes as June 28, 1895. Therefore, when the code took effect, they were not receivers into whose possession this money or property *"may come"*, because it already had come into their possession. The money or property itself was not such as *"may come"* into their possession, for the same reason. The act is clear on its face, and is fairly susceptible of but one construction—prospective. The language is plain and unambiguous, and refers only to after-acquired property and after-possessed receivers. To hold otherwise "is contrary to the grammatical construction and the plain, natural import of the words. There is no other language in the section warranting an inference that those words were in-

tended to have any other than their literal and natural meaning;" but the other words imperatively demand a purely prospective construction of the words *"may come"* and *"coming"*, and that they shall be read according to their grammatical construction, their plain import, and their literal and natural meaning; and so read and construed, the law has no application to the instant case.

In *Rice* v. *U. S.*, 53 Fed. Rep. 910 (C. C. A.), the court said (pp. 911-912):

> "This paragraph of the statute must be interpreted in the light of the familiar and well-settled rules for the interpretation of statutes, and particularly statutes of this [revenue] character. The paragraph is not obscurely or dubiously worded. The primary rule for the interpretation of a statute requires that it shall be interpreted according to the grammatical sense of the words in which the statute is expressed. That, so construed, the phrase *'embroidered and hemstitched handkerchiefs'* applies to handkerchiefs only which are both embroidered and hemstitched, cannot be gainsaid. * * * The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It cannot substitute, for the clear expressions which Congress has actually used, other expressions which the court think Congress ought to have used."

The court quotes (p. 912) from the opinion of the House of Lords in *Partington* vs. *Atty. Gen.*, L. R. 4 H. L. 100, 122, as follows (in part):

> "If the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. * * * In a taxing statute * * * you can simply adhere to the words of the statute."

Also (p. 912) the following from *U. S.* vs. *Wigglesworth*, 2 Story 369, 374:

> "It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing on a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed nor presumed to be imposed beyond what the statutes expressly and clarly import."

Had the judges below construed the above act by the rule of this case, is it not quite clear that they would have promptly held it to include two classes of handkerchiefs, just as they hold section 841 to include two classes each of persons and property and possession, though each law, strictly construed, plainly includes only one?

The doctrine of strict construction is not mere sound or shadow, but a vital rule firmly controlling all penal statutes. It is often aggressively quoted in principle, but calmly ignored in practice. It was utterly alien to this case in the courts below. It was not even mentioned or noticed by either judge, but each complacently applied the doctrine of liberal construction(?) to a drastic and highly penal statute, in order to effect the judicial intent.

The appellate judge says (R. 77) that "the fact which may be inferred from the indictment is made certain by the evidence, namely, that the money had come into the possession of the receivers prior to the enactment of the code." He then gives (R. 77-78) his reasons for concluding that (R. 78) "section 841 [*'may come * * * so coming into his possession'*] comprehends property that *may have passed* into the defendant's possession as receiver before the time that it went into effect."

In supposed support of this absurd conclusion and irrational construction of section 841, based upon reasons fatally defective under the first principles of statutory construction, he intensifies the fallacy by quoting (R. 77) the following from *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, 59:

> "Nothing is better settled than that statutes are to receive a sensible construction, such as will effect the

> legislative intent, and, if possible, so as to avoid or reject an absurd conclusion."

That language was used by this court in reversing a judgment against the accused, based upon a false construction of a statute far more susceptible of the reading given it by the inferior court than that given in this case to section 841 by the judges below. It does not defend, but destroys, the construction here applied. The appellate judge confounds "the legislative intent" with his own, and actually reverses the meaning of words in order to force the law to yield to his intent, and to what he thinks the law ought to be.

Though the appellate judge frequently uses *"may"* in the future sense, he seems at some pains to avoid the use of *"may come"*, but resorts to other rather strained expressions (R. 77, 78) to express his ideas. He bases his conclusion (R. 77-78) upon these grounds: (1) *Other sections* show that Congress did not intend to use *"may come"* literally—that is, in its usual, ordinary and popular sense, since it has no other—*but nothing whatever is said about "coming"* or *"into"* or *"shall"*; (2) the *object designed*—"a consideration of the mischief which the legislature sought to remedy", as it was expressed in *U. S.* v. *Harris,* 177 U. S. 305, 309—limits and controls the meaning of the terms and phrases used—that is, the intention is to be obtained from the supposed object designed, not the language of the statute, however plain it may be; (3) the *general intention* of Congress controls, not "its special intention manifested in the enactments", though such special intention was declared controlling in *U. S.* v. *Harris, supra;* (4) "it is inconceivable [*there is no reason*] that Congress intended to make a distinction" between persons and property that *may come,* and those that *had come,* into possession, or between property that *may come* or *coming,* and that which *had come,* into possession; (5) *there is no reason*—"no possible foundation in law or morals"—for such a distinction; (6) no court is justified in construing a statute prospectively and according to its plain terms, if a retrospective construction and a judicial re-editing and enlarging of it will hold the accused, though it contains an unmistakable expression of such prospective intent, and is wholly unambiguous; (7) no court is justified in adopting a construction that gives recognition to such a distinction if it would release the prisoner—let no accused man escape by holding that Congress means what it says.

The obsession of both judges is sharply shown by their opinions, which, reduced to the ultimate analysis, simply hold that Congress did not mean what it plainly said in section 841. In effect, they clearly concede that a strict construction excludes jurisdiction of this case. Every reason assigned by them for their judicial enlargement of this law has been so emphatically repudiated and denounced by this court, and all impartial judges, that it is difficult to speak in terms of moderation of their rulings.

In the leading case of *United States* v. *Wiltberger*, 5 Wheaton 76, the accused was convicted of manslaughter, under the 12th section of an act of Congress providing for the punishment of certain crimes against the United States. The 8th section of this act mentioned the high seas and a river, haven, basin or bay, but the 12th section mentioned the high seas only. The manslaughter charged in the indictment was committed by the accused on board of an American ship on a seaman belonging to said ship, whereof the defendant was master, in the River Tigris, in the Empire of China.

The jurisdiction of the trial court depended upon the place in which the crime was committed. This court held that the term "high seas" can never extend to a river in the interior of a country. The United States insisted on the jurisdiction of the trial court not so much on the extension of the words "high seas", as on that construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder must be committed, on the 12th section which described the place in which manslaughter must be committed. To this contention, the court, by *Chief Justice Marshall,* replied as follows (pp. 94, 96):

> "This transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature. * * *
>
> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial departmnet. It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * *
>
> "The intention of the legislature is to be collected from the words they employ. Where there is no am-

> biguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

The court then examines the act in detail, applies these principles, and holds that the 12th section is to be construed according to its own terms, and that those of the 8th section cannot be engrafted on it, and concludes as follows (p. 105):

> "From this review of the examination made of the act at the bar, it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute."

The court was unanimously of the opinion, after giving the subject attentive consideration, that the offense charged in the indictment was not cognizable in the courts of the United States. This decision was rendered in 1820, and its principles have never been departed from by the Supreme Court, but, on the contrary, have been re-affirmed time and again.

The language of the *Wiltberger* opinion can be lifted and applied almost bodily to the statute in the present case, by simply reading person or property for place. To example:

> "If the words ['any * * * receiver * * * into whose possession money * * * or other property

* * * may come * * * shall be deemed guilty of embezzlement of the * * * money or other property so coming into his possession'] be taken according to the common understanding of mankind—if they be taken in their popular and received sense", they do not apply to persons or property that had come into possession before the law was passed. (p. 94).

"There is, too, in a penal statute, a difference between restraining general words and enlarging particular words". (p. 97).

"The crimes of [embezzlement of pre-acquired and after-acquired property] * * * , it has been truly said, are kindred crimes; and there is much reason for supposing that the legislature intended to make the same provision for the jurisdiction of its courts, as to the * * * [property of] which either might be committed." (p. 97).

"When the legislature is about to describe the * * * [property of which embezzlement by a receiver], cognizable in the courts of the United States [in the District of Columbia], may be committed, no reference whatever is made to a prior section respecting * * * [other species of embezzlement]; but the description is as full and ample as if the prior sections had not been in the act. This would rather justify the opinion, that in proceeding to * * * [embezzlement by fiduciaries], the legislature did not mean to refer us to the sections on * * * [embezzlements by other classes of persons and of other classes of property] for a description of the * * * [property of] which the crime might be committed, but did mean to give us a full description in the section [841] on that subject." (p. 98).

The prior sections of the code take up embezzlement by other persons and of other property, but omit the words *"may come"* and *"so coming into his possession"*, etc., used in section 841; except that section 833 applies only to property *"which shall come into his possession"*, and section 48 only to collateral which *"shall be deposited."* (p. 99).

"It has been argued, and, we admit, with great force, that in this section [841] the legislature intended to * * * [include persons and property that had come into possession before the act was passed or took ef-

> fect]; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offense committed * * * [by persons who may come and those who had come into possession, or of pre-acquired and after-acquired property]. Yet it would be carrying construction very far to strike out [or add to] those words ['may come' and 'coming']. Their whole effect is to limit the operation which the * * * [section] would have without them; and it is making very free with legislative language to declare them totally useless [to limit section 841], when they are sensible and are calculated to have a decided influence on the meaning of the * * * [section]". (p. 99).

It is again to be observed that in section 841 Congress makes no reference to previous sections or parts of the code for a description of the persons or property or possession required,—

> "but has inserted a description, and by so doing has materially varied the obvious sense of the section [from that of some prior sections]. * * * The probability is that the legislature designed to punish all persons [guilty of embezzlement of either pre-acquired or after-acquired property] * * * and such would have been the operation of the act had the words been omitted [and others used in their stead, or had others been added to those used in section 841]; but the legislature has chosen to describe the * * * [persons and property by whom and of which the offense must be committed], and has not referred to a description contained in any other [section or] part of the * * * [code]. The words are, * * * ['any * * * receiver * * * into whose possession money * * * or other property * * * may come * * * shall be deemed guilty of embezzlement of the * * * money or other property so coming into his possession']. The court cannot reject this description." (p. 101).

If we can supply the words *"might have come"*, or *"may have come"*, or *"come"*, or *"may be"*, or *"may have passed"*, or other words of retrospective effect, because such words appear in some other sections, we can also supply other words from other sections, and—

"probably defeat the will of the legislature. Yet if we depart from the description of * * * [persons and property] given in the section [841], in which Congress has obviously intended to describe * * * [them], for the purpose of annexing to the words * * * [of prospective effect actually used those of retrospective effect absolutely omitted in this section but] found [?] in * * * [some of the prior sections], there would be at least some reason in the argument which would require us also to annex to the words * * * [of this section the words * * * found in the * * * [prior] sections". (p. 102).

"But these words ['may come' and 'coming into his possession' etc.], are sensible and are material. They constitute the description of the * * * [persons and property] which the legislature has chosen to give us; and courts cannot safely vary that description without some sure guide to direct their way." (p. 102).

"The * * * section [841] takes up the crime of * * * [embezzlement by fiduciaries], which is not mentioned in the * * * [other sections]; and, without any reference to * * * [them], describes the * * * [persons and property by whom and of] which it must be committed, in order to give jurisdiction to the courts of the United States [in the District of Columbia]. That * * * [property is and those persons are only such as 'may come * * * so coming into * * * possession']. There is nothing in this section [841] which can authorize the court to take jurisdiction of * * * [embezzlement by a receiver into whose possession the property had come before the law]". (p. 103).

"The legislature annexes to the offense a description of the * * * [persons or property by whom and of] which it must be committed in order to give the court jurisdiction. * * * Congress has annexed a description of * * * [persons and property]. * * * The conclusion seems irresistible, that Congress has not in this section [841] inserted the limitation of * * * [persons and property] inadvertently; and the distinction which the legislature has taken [between persons and property that 'may come', and those that might have come, into possession] must, of course, be respected by the court. * * * The description of the * * * [persons and property] is complete in itself, and [section 841] makes no reference to the de-

> scription of * * * [persons or property] in the others." (p. 104).

Attention is also called to the fact that all of the other sections of the code relating to the various phases of embezzlement, including section 841, describe the property and time of possession required "without any reference to a preceding section." (p. 104).

> "This characteristic feature of the law now to be expounded, deserves great consideration, and affords a powerful reason for restraining the court from annexing to the description contained in one section, parts of the description contained in another." (p. 105).

"This characteristic feature" also proved controlling in the construction of the statutes involved in *French* v. *Spencer*, 21 How. 228, 238, and in *Hamilton* v. *Rathbone, infra.*

In *Hamilton* v. *Rathbone*, 175 U. S. 414, the court construed section 728 *R. S. D. C.*, which gave to a married woman the right "to devise and bequeath her property". This section was drawn from a prior act which limited her right to devise and bequeath, to such property as she had not acquired by gift or conveyance from her husband. The Court of Appeals of the District of Columbia held section 728 limited as the original act, and reached this conclusion by ignoring the plain terms of the section standing alone, and recurring to the original act in order to create an ambiguity which did not exist on the face of the section; and so cut down the real meaning of the words "her property" to read as if the words "not acquired by gift or conveyance from her husband" had been added to or engrafted on the section. This court reversed, and said (p. 419):

> "But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

The court says that this rule has been repeatedly applied in the construction of the various sections of the U. S. Revised Statutes, and cites some of the cases so holding (pp. 419-421), and proceeds (p. 421):

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended re-

> view of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper construction."

Neither judge below finds any ambiguity whatever in section 841 for that is impossible; but because the act does not comport with their ideas of what it ought to be (and must be to fit this case), they arbitrarily hold that its words mean the reverse of their established sense. The trial judge (as we have seen) relies chiefly upon the *"no reason"* argument. The appellate judge does the same, but in addition he gratuitously assumes (R. 77) that the different words of some prior sections are retrospective (though they are most likely prospective, while others are exclusively so), and then proceeds to engraft such retrospective words on to section 841; and this he complacently calls construction.

In *Burton* v. *U. S.*, 202 U. S. 344, it was said (pp. 377, 391, 400):

> "It is the legislature, not the court, which is to define a crime and ordain its punishment.
>
> * * * * * * * * * * * *
>
> "Unless the statute by clear intendment includes the transaction, any extension beyond its meaning would be, under the elementary rule governing the interpretation of criminal statutes, simply judicial legislation, as it would be by judicial construction making that a crime which Congress has not so made, and thereupon imposing punishment. * * * It seems clear to my mind that the construction now given writes into the statute an offense which Congress never placed there. It is a criminal case, and, in such a case above all, judicial legislation is to be deprecated."

In *Mackey* v. *Miller*, 126 Fed. Rep. 161, 163 (C. C. A.), the accused were convicted by a judicial enlargement of the language of *R. S. U. S.* Sec. 5447, on the theory that they were within the general intention of the act. They were charged with resisting an Indian agent, and using a deadly weapon against him while he was searching for liquors on a reservation. The law relates to assault-

ing, resisting, etc., any officer of the customs or his deputies, or any person authorized "by this act" to make seraches, etc. It further provides that if a deadly weapon be used, the offender shall be deemed gulity of felony. After their conviction, the accused sued out *habeas corpus*, on the ground that the trial court was absolutely without jurisdiction, because the law did not apply to or include an Indian agent. The writ was dismissed by the Circuit Court; but on appeal to the Circuit Court of Appeals for the Ninth Circuit, this judgment was reversed and the accused were discharged from custody, on the ground stated.

In *McCarthy* vs. *McCarthy*, 20 App. D. C. 195, 202, 203, the court construed a section of the code relating to married woman, and said:

> "Where the legislature makes a plain provision in regard to any subject matter, the courts are not at liberty to add to or extend that provision beyond the plain import of the words employed. *Shaw* vs. *Railroad Co.*, 101 U. S. 557. • • • The Act of Congress is expressed in plain terms, and leaves no room for conjecture. In such case the rule is imperative, and cannot be departed from without assuming on the part of the judicial tribunals legislative powers. *French* vs. *Spencer*, 21 How. 228, 238."

In *Clark* vs. *U. S.*, 19 App. D. C. 295, 309, the court *(per* Shepard J.), in construing a section of the code (jury law), said:

> "The situation, however, will not justify us in reading such a provision into one of the saving clauses, or into one of the exceptions from the general repeal of former laws. There is no ambiguity in the provisions referred to that calls for interpretation, in the course of which an exception might be raised by construction to prevent a result which, had the legislative attention been directed to it, would undoubtedly have been guarded against. Courts cannot be justified in adding a provision to a statute under the guise of construction."

In *Bank* v. *Berlin*, 26 App. D. C. 218, 220, *supra*, *(per* Shepard, Ch. J.,) it was most emphatically held that section 1214 of the code relating to liens of judgments "from the date when the same *shall*

be rendered" does not include a judgment rendered after the code was passed but before it took effect, but only future judgments. We have already quoted from this case at some length. The reasons given for that decision destroy those assigned for that in the case at bar. Both cannot be right. That is. This is not.

If a different rule applies to this case than to those quoted, we frankly confess our inability to understand the reason why. The only distinction is that they involve civil statutes and a few dollars, while this involves a drastic penal act and a large pecuniary forfeiture.

We can cite no less than twenty other decisions of the Court of Appeals, construing various sections of the code, to show conclusively that if section 841 had been a purely remedial statute, that court would have held it not to include persons and property that had come into possession before the code, or to forfeit vested rights or claims to commissions, costs and charges. It is absolutely impossible to reconcile those decisions with this, though nearly all were civil cases.

If there really be any doubt or ambiguity about section 841, it is not to be resolved against the accused, though the judges below do neither recognize nor apply this rule in criminal cases; but they have given it effect in a civil case involving the construction of a taxing statute. *Wash. Transportation Co.* v. *D. C.*, 19 App. D. C. 462, 470.

The well-established rule is that if a penal statute be ambiguous, the courts will lean to that construction which favors the accused. *Hackfeld* vs. *U. S.*, 197 U. S. 442, 450. *Bolles* v. *Outing Co.*, 175 U. S. 262, 265. *Ex. p. Baily*, 39 Fla. 734, 743. *U. S.* v. *Wigglesworth*, 2 Story 369, 374. *State* v. *Myers*, 56 Ohio St. 340, 349, 350. *Matheson* v. *U. S.*, 71 Fed. Rep. 394, 396 (C. C. A.). *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616. *Twine Co.* v. *Worthington*, 141 U S. 466, 474. *Baldwin* v. *Franks*, 120 U. S. 678, 691, 692. *Rice* v. *U. S.*, 53 Fed. Rep. 910, 912 (C. C. A.).

What is doubtful or ambiguous about section 841? What language renders it uncertain? What gives a court any right to construe it, insteading of simply following and enforcing it? What warrants the judges below in substituting their conjectures for the plain meaning of this law? Where is there any room for construction? What right had they to depart from the clear sense of this

act standing alone, and resort to reasons entirely *dehors* section 841 in order to create an ambiguity in it? How can they substitute their will for the legislative will? How can they enlarge the language of this law as they see fit?

Can a man be convicted of horse-stealing under a statute against hog-stealing? Or of the larceny of a white horse for a black horse? Of a diamond for a dog? Of a hat for a harness? Of pre-acquired for after-acquired property? Of larceny on the high seas for larceny on land? Of carrying tickets for a lottery that has been drawn for one to be drawn? Of importing lager beer for spirituous liquor or wine Is one liable as a receiver under a statute against a company?

In this case, the judges below have simply obliterated Congress, and made their courts supreme, as the law-making power; and their courts, after all, merely reflect and enforce their individual will in this case, and not the legislative will which section 841 so plainly declares for all cases.

In *Webber* v. *St. Paul*, 97 Fed. Rep. 140 (C. C. A.), the court well said (p. 144):

> "Whatever the result of such an investigation [of the common law], that law [the Minn. statute] must still prevail, and it is too plain to be construed away. When the language of a statute is unambiguous, and its meaning is clear, arguments by analogy or from history and attempted judicial construction serve only to create doubt and confuse the judgment. They serve to obscure far more than to elucidate the meaning of the law. There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction."

To the same effect: *Johnson* v. *Ry. Co.*, 117 Fed Rep. 462, 465, 467, 469 (C. C. A.). *Swartz* v. *Siegel*, 117 Fed. Rep. 13, 18-19 (C. C. A.). *In re Schilling*, 53 Fed. Rep. 81, 83 (C. C. A.).

The courts below merely created confusion by their attempts to construe this law. Simply take it as it reads, and there is no doubt or difficulty whatever as to the persons and property and possession and acts that it includes; but if there be any ambiguity, it must be

resolved in favor of the accused, as we have said. The elementary rules of statutory construction have been wholly ignored by the judges below. They have applied the civil rule of liberal construction to a penal act. The appellate judge swiftly passes the cases declaring the imperative rules of construction of statutes, and especially penal statutes, with the single remark (R. 77) that none of them "covers the particular phase of statutory construction here presented." If by "covers" he means "supports", the statement is true; for all of them most emphatically denounce both the construction and method of construction applied by him. We have again laboriously presented them herein as absolutely controlling in this case, and in order that this court may judge the correctness or error of his remark.

To contend that *"may come"* and *"coming"* are prospective only, is to argue a self-evident, axiomatic proposition; yet in this case there is neither allegation nor proof that the defendants received any money or property whatever after the code took effect. Section 841 simply has no application at all to the instant case. It is for Congress, not the court, to supply the hiatus which so clearly exists between (1) pre-acquired property and pre-possessed receivers, and (2) after-acquired property and after-possessed receivers, under this law.

Since the decision in 1896, in *Chapman* v. *U. S.*, 164 U. S. 436, 446, holding that this court has no jurisdiction on error of a judgment of the Court of Appeals of the District of Columbia in a case involving merely the issue of guilt or innocence of crime, that court has not disturbed judgments against the accused so as to be noticeable; but judgments in favor of the accused have (in comparison) frequently been reversed under section 935 of the D. C. Code, which provides that "in all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given the defendant, including the right to a bill of exceptions." Reversible errors appear most common in civil cases, but practically impossible in criminal cases if the judgment is against the accused.

It is true that to err is human—sometimes; but it is equally true that it is often inhuman. *Neither of the judges below has given or been able to give any good reason whatever* for his alleged construction of section 841; and we have sought in vain to find any warrant

or excuse in law, language or logic, for their conclusions. It is a plain case of judge-made law. Yet they have committed far more serious errors in this case.

In *Ex p. Kearney*, 55 Cal. 212 (1880), the court said (p. 223):

> "But it is only when an offence particularly aggravating against morals or justice has been committed, that a temptation arises to distort the law, to expand the meaning of words beyond their plain purport, to give to a penal statute an effect not intended by those who framed it nor required by its language, that we may bring within its scope, and subject to condign punishment, those whom we believe deserve the severest penalties. At such times, if ever, we forget that the worst as well as the best of men is entitled to the protection of the Constitution, and that a strained interpretation of the law which deprives a bad man of his right to personal liberty today, may tomorrow deprive a good man of his equally sacred—in the eyes of some of us perhaps more sacred—rights of property."

II. COMMISSION AND LETTERS ROGATORY.

(1) Our demurrer (R. 2-4) was overruled (R. 4-5) as to four counts on Friday, April 28, 1905; whereupon we gave notice in open court that we should apply to the Court of Appeals for a special appeal on the reconvening of that court on Tuesday, May 2, 1905, on which date a petition for such appeal was presented, but was denied later in the same day (R. 11). On the next day, May 3, 1905, we filed our motion (R. 5) and affidavit (R. 5-6) for (1) a commission under Code Sec. 922 to take the depositions, on written interrogatories, of our material non-resident witnesses Gilbert and Hotchkiss, in New York city, and for (2) letters rogatory under Code Sec. 1058 to take the deposition of our material foreign witness Miller, in London, England; reciting that said persons are material witnesses for us. The affidavit (R. 5-6) states briefly and concisely the facts which "this defendant will prove" by each of the said witnesses, and certain other pertinent matters. This motion was heard on one day's notice (R. 6), and on Thursday, May 4, 1905, *was granted* (R. 7). On May 5, 1905, our interrogatories (R. 11) to each of said witnesses were filed and served.

They appear in full in the transcript (R. 72, items 9-11), but were not printed because we thought it unnecessary (R. 74). No cross-interrogatories were ever filed; no commission or letters rogatory were ever issued; but nevertheless on Monday, May 8, 1905, shortly after 10 o'clock a. m., we were forced into trial against our earnest protests. Between the time when the order was passed and such trial begun there intervened one Saturday half-holiday and one Sunday. Thus the order was effectually nullified and killed, and all our time and labor and the proceedings relating to it were wasted and useless. We were entitled to this order as a matter of right, and not of discretion or favor; and we were likewise entitled to a reasonable time to execute the order and get the benefit of it. The commission and letters rogatory are compulsory process within the meaning of the Sixth Amendment. We should have been better off if the court had frankly denied our motion instead of having granted it and then surprised us by a sudden and unexpected refusal to give us any time to execute the process ordered. Sec. 922 provides in criminal cases that "if a material witness for the defendant resides beyond the District of Columbia * * * the defendant may apply in writing to the court for a commission to examine such witness upon interrogatories thereto annexed when the deposition is to be taken beyond the District of Columbia, * * * and the court may grant the same," etc. The law also provides for notice to the U. S. attorney, for cross-interrogatories within a definite time to be fixed, for oral examination if good cause be shown, for the issuance and return of the commission as in civil cases, etc. Sec. 1058 provides that "when the testimony of any witness residing in any place not within the sovereignty of the United States is desired in any cause pending in any court of the District of Columbia, the same may be taken upon interrogatories and cross-interrogatories filed in said court, and transmitted by said court under lettere rogatory, addressed to some court of record in the foreign State in which said witness is then to be found."

(2) The Sixth Amendment provides that "in all criminal prosecutions the accused, shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor." The Constitution is to be construed liberally in favor of the rights of the accused. *Ex p. Lange*, 18 Wall. 163, 178. Secs. 922 and 1058 were made in pursuance of this provision. "May grant" in section 922, and "may

be taken", in section 1058, are not permissive, but mandatory. The general rule is that "may" in a statute is mandatory where the public or third persons have a claim *de jure* that the power given by the statute be exercised. These sections were enacted exclusively for the purpose of creating an absolute right in and for the benefit of the accused in criminal cases, and were not intended only to confer a mere discretion on the court. The court must grant the order on proper application, such as was made in this case.

In *Rock Island* vs. *U. S.*, 4 Wall. 435, when passing on a statute reading, "The Board of Supervisors of counties under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax", this court said (pp. 446-447):

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, as in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless. In all such cases, it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose an absolute duty."

In *State* v. *Rodgers*, 32 Ark. 462, 464, under a statute quite similar to Code D. C. Sec. 922, providing that the court "may authorize" the taking of depositions of non-resident witnesses for the accused, in criminal cases, it was held that the court with without discretion to refuse the order; and the trial court was compelled by *mandamus* to order the commission to issue. In a vigorous opinion in *U. S.* v. *Wilder*, 4 Woods, 475, 476, the court held that the commission must issue in criminal cases under the federal statutes, though no express provision for such cases is made thereby. *In re Carter*, 3 Ore. 293, 296, under a statute providing for commission, it was held that "may, in his discretion", is permissive, but "may" is mandatory.

That sections 922 and 1058 are mandatory is also shown by their comparison with other like provisions of the code and rules, viz.: Sec.922, "may grant". Sec. 1058, "may be taken". Sec. 1060, "may order". Sec. 26, "may * * * appoint an examiner * * * to whom he shall issue a commission." Sec. 1061, "may be taken * * * provided the court may, in its discretion." Common Law Rule 115, "may appoint an examiner" (by C. L. Rule 111 all C. L. Rules govern criminal cases as far as applicable). Eq. Rule 65, "may * * * appoint an examiner". Eq. Rule 68, "shall * * * issue a commission". In *Wallace* v. *American Linen Co.*, 2 Thomp. & C. (N. Y.) 574, it was held that an order refusing a commission to take depositions of non-resident witnesses, affects a substantial right and is appealable.

(3) The order granting the motion for a commission and for letters rogatory was, in effect, a decision that *the witnesses were material*, as code section 922, under which the order for the commission was granted, provides that "if a material witness for the defendant resides beyond the District of Columbia * * * the court may grant" a commission to take the deposition, etc. The court cannot grant a commission to take a deposition of an immaterial non-resident witness. The intense materiality of the desired evidence was sharply shown by the recent trial, and especially the result. To the non-ownership of the W. B. E. A., etc., the evidence of Hotchkiss and Gilbert was highly important. That Miller's evidence was especially material was also shown by the court's ruling (R. 55-56) on Mead's evidence of the very same character, which was distinctly held material over specific objection thereto and motion to strike out, interposed by the Government (R. 56).

It seems very strange that when the law gave the defendant the absolute right to the commission and letters rogatory and the evidence sought thereby, the court could nullify this right by putting him on trial before, by any human possibility, he could get any benefit whatever from them.

In *Symes* vs. *Irvine*, 2 Dall, 383, 384, it was held that the court will not, in every case, require the party applying for a continuance to get the testimony of non-resident witnesses, to disclose the matters of fact to which such witnesses are expected to testify. Here, however, we have fully made such disclosure in our motion (R. 5) and affidavit (R. 5-6) for the commission and letters rogatory,

and in our affidavit (R. 10-16) for continuance, and by our interrogatories.

(4) Our application complied strictly with the law. As the court had no power to refuse the order directly, it could not do so indirectly by denying us the time necessary. This subject is made a material part of our motion and affidavit for continuance (R. 11-14, 15-16), and is covered by our exception (Ex. 3, R. 29) to the denial of that motion, and specifically by some of our other exceptions (Ex. 4, R. 29, Ex. 30, R. 56-57).

We had an absolute right to stand on the order, which was far more efficacious to us than the mere personal presence of the New York witnesses by summary process, on account of the documentary evidence sought, which it would require a reasonable time for them to produce. It was their evidence, not their presence, that we wanted; for without the documentary evidence called for by the interrogatories, their testimony would be greatly impaired, if not entirely useless. The order could not be avoided, and the error cured, by a mere offer (R. 29) of an order for summary process to bring those witnesses here, made on the very eve of a forced trial; nor could such process reach Miller, in London, England; nor did the court include him in the *post-obiter dicta* about process for our non-resident witnesses (R. 56-57). We do not suppose that the trial judge intended that the summary process of his court should run into, or be compulsory on Miller in, England; but he seemed to have overlooked this in ruling on our motion (R. 29) for time to execute the order for the commission and letters (R. 29, Ex. 4).

At no time did we abandon our right to the commission and letters rogatory or either of them, or to reasonable time to execute them; but, on the contrary, just before the jury was empaneled and sworn (R. 29), we again asked for the necessary time (R. 29), which the court again denied us (Ex. 4, R. 29); and at the close of all the evidence in the case we (R. 56-57) "moved the court to withdraw a juror and discharge the jury from further consideration of the case, because the Government had not crossed the defendant's interrogatories to his New York and London witnesses, which he had filed May 6 [5[, 1905, and because, in view of the fact, the defendant was unable to proceed further with his case." This motion was overruled (Ex. 30, R. 56-57).

We were entitled absolutely to reasonable time to prepare our

defense. This rule applies to all crimes, however heinous. We must have compulsory process for our witnesses, with reasonable time and opportunity to obtain the benefit of the same. Having been absolutely denied the benefit of our defense, the appellate will reverse for this reason alone.

"Compulsory process", in the federal Constitution, is to be read in a broad sense.

Nothing can justify or excuse a court in forcing the accused to trial at such time or in such manner as will deprive him of, or impair, any of his constitutional rights. His right to compulsory process for his witnesses must not be trifled with nor made a dead letter. He must be accorded all reasonable facilities in the preparation of his defense. It was grave error to deprive us of all benefit of our application and order for the commission and letters rogatory.

By giving the accused the right to have compulsory process for witnesses in his favor, the Constitution guaranteed a right of substance, not of form. The substantial thing is the evidence of the witnesses. Their mere personal presence is simply a means to the end sought. To give the accused compulsory process for the presence of his witnesses, summarily and without time to get the documents required of them, is idle form; for his witnesses who are unable to testify according to the rules of evidence without certain documents, and without a little time to enable them to get the required documents and to speak intelligently as to the facts sought to be proved by them, are not the witnesses in his favor guaranteed by the Sixth Amendment. A commission, under the federal laws, is mandatory on the receiving court, and that court is bound to issue its compulsory process for the witnesses named, on demand. The commission itself, then, is compulsory process with the required aid or intervention of the receiving court, but a step removed from process for a local witness. The letters rogatory are the same, if the foreign court acts on them; for its compulsory process then goes for the witnesses named. So that, either under commission or letters rogatory, so far as the witnesses are concerned, they attend and testify under compulsory process in the full meaning of the term.

(5) The order for process (R. 7) for our New York witnesses was interlined in the minute record of the order for commission (R. 7) long after the trial had closed. It was first found by us on Decem-

ber 7, 1905. At the close of all the evidence, speaking of such an order, Mr. Baker said to the court (R. 57): "There was no order made of record. I examined the record, and found no such order." Assuming as true the recital of the bill of exceptions (R. 29) that "the court tendered to the defendant compulsory process to secure the attendance of said witnesses [one of whom was in London, England]; of which the defendant declined to avail himself"; why should such an order appear in the minutes at all? Is it sufficient to offset the effect of overriding the order for the commission and letters rogatory?

It was unwarranted to assume that the accused had no good defense, in the face of his direct and uncontradicted affidavit (R. 10-16, 14) to the contrary. The best of defenses is easily cut off by refusing time and facilities to prepare it properly, and opportunity and assistance of counsel and witnesses to present it properly. There was no possible or conceivable harm or injury that could be done to anyone by granting the accused a little time to prepare for trial and to get the benefit of the order for the commission and letters rogatory; yet this was denied him (R. 29, Ex. 4).

(6) If the right to the commission and letters rogatory as matter of discretion and not of right, then there was an abuse of discretion by the trial court in denying us the necessary time to execute them; and such abuse of discretion may be corrected on appeal, by analogy to the right to rview orders denying bills of particulars and continuances, especially when the point is saved by specific objections and exceptions (Ex. 4, R. 29, Ex. 30, R. 56-57), as it is in this record. It may be safely stated that any matter resting in the sound discretion of the trial court may be reviewed on appeal whenever there has been (1) a refusal to exercise such discretion or (2) an abuse of such discretion.

(7) The accused was put on trial about one month after indictment, but judgment (R. 26) was not entered until two and one-half months after verdict; we waived the 38 days after judgment allowed us by Rule 55 of the trial court to present our bill of exceptions, and presented it instanter on the rendition of judgment (R. 27); the bill was not signed (R. 71) until about three and one-half months after it was presented; and we were unable to get our transcript of record out of the trial court until one month thereafter (R. 73). If a small part of the seven months after verdict had been

added to the one month before, we should have been prepared for trial and should not be here. *All cause for haste vanished with the verdict.* There has never been one moment's delay or laches on our part, from the beginning to the end of this case; but, on the contrary, the record shows our exceptional diligence at all times and in every respect.

This case was docketed in the Court of Appeals on December 8, 1905 (R. 74). We were ready to argue it in January, 1906, but the government counsel then asked the court to pass it until February, and then again until March, when it was argued and submitted (R. 75). It was decided by the appellate judge on May 1, 1906 (R. 75, 85), and our motion for a rehearing was denied on June 13, 1906 (R. 85), and our petition for a writ of error to this court was submitted and overruled on the same date (R. 85-86).

The allowance of reasonable time and facilities to the accused and his counsel to prepare for trial, would certainly have resulted in the same verdict that was rendered a few months later on his co-receiver's trial—not guilty.

The appellate judge, in holding (R. 78-80) that we were not entitled to a continuance, disposes of our order for commission and letters rogatory by saying that the evidence sought under the commission was incompetent (R. 79), and that under the letters rogatory "does not show a good defense" (R. 80), etc. We shall therefore recur to this subject *infra* in considering our motion for a continuance, and try to show that he is again in error.

The trial judge gave no reason whatever for his astounding action in forcing the accused to trial on Monday morning, in the face of his own solemn order for the commission and letters rogatory of the previous Thursday. He did not even vacate that order. It is difficult to characterize his action in seemly terms, and we therefore refrain from the attempt.

III. INSPECTION OF PAPERS IN EQ. 15907.

(1) About two months before the alleged trial of this cause, there were removed from the office of the clerk of court to the office of the District Attorney all of the original papers and records in Equity No. 15907, mentioned in the indictment, and kept by the

last-named official in his office up to and during the trial (R. 9, 14-15, 17, 22-26,, 28-29). On Thursday, May 4, 1905, we filed our motion and affidavit (R. 9) for an order requiring him to return and restore forthwith to the clerk's office all of these papers and records, for it was highly necessary that we should have access to, and be permitted freely to examine and inspect them in order to prepare properly for trial; but our motion was denied on May 8, 1905 (R. 17), and we excepted (R. 28-29, Ex. 1). After our motion was filed the prosecutor invited us to examine the papers in his office (R. 28). This was on Thursday; so that it gave us only seven hours on Friday and three on Saturday—ten hours in all—to examine "a two-bushel box" of them (R. 25) or "a bushel-basket of them" (R. 29) before the trial began. The trial court's reasons (R. 29) for denying our motion find no support in the law of inspection of public records. This subject is referred to in our affidavit for continuance (R.14-15), which recites "that it is essential that affiant's counsel shall fully understand the details of all the said proceedings; that the U. S. Attorney has had all of the material papers and records in the said Equity Cause No. 15907 in his exclusive possession in his office ever since the said indictment was returned, if not longer; that affiant and his counsel cannot properly prepare for trial without opportunity freely to inspect and examine the said papers and records, * * * which opportunity they have not had;" and this recital is supported by the affidavits (R. 16, 23-24) of the counsel, Messrs. Baker and Walker. The subject is also mentioned in our motion and affidavits (R. 21-24) for new trial, the accused's affidavit (R. 22-23) reciting that we had no reasonable time or opportunity to examine any of said papers before or during the trial, except during the trial only those which were identified and those which were offered in evidence, all of said papers in Eq. 15907 other than those put in evidence having been kept in his own close custody by the U. S. Attorney, and daily brought to the trial court from and returned to his office at the opening and adjourning of the court during the trial. This recital is supported by Mr. Walker's affidavit (R. 23), who also says that "he had no reasonable time or opportunity to study this cause, or to examine any of the papers in said equity cause prior to or during the trial;" and by Mr. Baker's affidavit (R. 24), who says that he "had no reasonable time or opportunity to examine any of the papers in Equity Cause No. 15907 before or

during the trial"; that he was not connected with said cause "in any manner, and knows but very little about it, and most of that he learned during the trial of this case." None of the facts upon which we based our motion for inspection was directly denied; and it requires no argument to show how vital to us was the inspection of said papers before trial. We had an absolute right to inspect them where they lawfully belonged—in the clerk's office and custody—both by statute and common law; and it was reversible error to deny our motion. These papers were public records having reference and relating to real and personal property in the District of Columbia.

(2) "All public records which have reference to or in any way relate to real or personal property in the District of Columbia, whether the same be in the office of the recorder of deeds or in some other public office in the District of Columbia, shall be open to the public for inspection free of charge." *Code D. C.* Sec. 556.

"Whosoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys, abstracts, or conceals the whole or any part of any record authorized by law to be made, or pertaining to any court or public office in the District, or any paper duly filed in such court or office," shall be fined or imprisoned or both. *Code D. C.* Sec. 844.

These sections settle our statutory right; and the cases establishing our common law right are collated in 24 *Ency. Law* 182-184.

Rule 104 of the trial court (which applies to the criminal courts by Rule 111) provides:

"The clerk *shall not* hereafter [1898] allow any original papers in any cause, at law or in equity, to be taken out of his custody, except by the auditor or an examiner of the court, as hereinafter provided."

No exception is made as to the U. S. Attorney.

(3) The code, the common law, and the court rules require that court papers shall not be removed from the clerk's office or custody; otherwise the right of free inspection would be nullified, as it effectually was in this case. The inspection of public records provided for means free inspection in the lawful place of custody, and not embarrassed inspection in some other place to which they have been unlawfully removed and held in close custody by some unauthorized

person, who had no right either to abstract or to conceal them. The U. S. Attorney had no right to be present, in person or by assistant or other representative, at any conference between the accused and his counsel, nor at any inspection of said papers by them, nor to require them to inform him by word or act as to what of said papers they desired especially to see, nor to compel them, either directly or indirectly, to disclose to him the defense, or any part of or clue to it; nor had the court any power so to do. The law of inspection of public records emphatically forbids what was done by the prosecutor in this case; we were seriously injured by it; and the court finally shut us off from our right of inspection by denying (R. 17) our motion (R. 28, Ex. 1), and in this committed grave error.

> "The accused, however, must be accorded all reasonable facilities in the preparation of his defense," 9 *Cyc.* 172.

The rule as to ordering documentary evidence into the clerk's custody does not apply to "any document or other writing required by law to be kept in the custody of some particular person". *Bass vs. U. S.* 20 App. D. C. 232, 245. Here we could not even have ordered into the clerk's custody the papers which the law required to be kept in his custody. This was a fatal error; and neither the affidavit of Mr. Beach (R. 17) nor that of Mr. Smith (R. 25-26) presents any good reason for their acts or the court's ruling in the premises. The record clearly shows how seriously and unjustifiably the accused was hurt in this respect. The trial began (R. 29-30) within a few moments after our motion was denied; and we were thus refused any time or opportunity to get the benefit of even what the court offered us in its ruling (R. 29). "The U. S. Attorney states that he needs the papers in evidence" (R. 28) · but the court ruled out a record from the recorder's office (R. 42) "on the ground that it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence."

(4) If these papers were needed in the District Attorney's office in preparing the case for trial (R. 17, 78), were they not at least equally required by the accused and his counsel? The statement of the prosecutor (R. 17) that "some of the papers had been lost or abstracted when they were in the file room of the court", to which the appellate judge refers (R. 78), was made in the presence

of the jurors who were a few moments later empaneled and sworn in this case, and it insinuated that the accused was responsible for such loss or abstraction. The facts are these: (*a*) In the latter part of the year 1900 a stranger called at the clerk's office, and asked to see the auditor's report of July 31, 1900 (R. 35-36), and it was handtd to him by Mr. Meigs, an assistant clerk. It has not been seen since; but immediately upon learning of its loss, the plaintiff in error furnished the clerk's office with a complete copy of it, which he had previously obtained from the auditor, and this copy has ever since taken the place of the original. (*b*) In May, 1904, it was discovered that the receivers' certificates of deposit (R. 38) were missing from the files; but a little later they were found in the office of Mr. Edwards, one of the solicitors in the equity case, and returned to the clerk's office by his executor. No others of said papers have ever been lost or abstracted, and the innunendo against the accused was utterly baseless.

We were denied access to said papers, and were not afforded any facilities for examining them. The trial judge (R. 28-29) gave us no time whatever to inspect them, and thus nullified what he offered (R. 29) us. He also says that his "desire is not to subject the papers to loss" (R. 29)—another gratuitous slap at the accused in the presence of the panel of jurors. For similar remarks of the prosecutor and judge reflecting upon the accused and his counsel, on a motion for continuance, in the presence of the jurors soon afterwards sworn in the case, a conviction was reversed in *Allen* v. *U. S.*, 115 Fed. Rep. 3, 9-10 (C. C. A.), in a vigorous opinion.

Among these removed papers and records were the many orders which the equity court had passed from time to time, during the eleven years of the receivership, directing the receivers to pay or invest; and all of the disbursements made by the receivers under these orders were received (R. 38-41) as evidence of their embezzlement by the accused, as we have said, and he was left utterly helpless; yet the appellate judge says (R. 78) that " it nowhere appears that the defendant suffered any detriment by the denial of his motion."

We submit that there was a gross abuse of discretion by the trial judge in denying the accused the inspection of the said equity papers and records, even conceding that it was a matter of discretion, which it was not.

IV. BILL OF PARTICULARS.

(1) The indictment (R. 1-2) is general only, and does not give the accused any information whatever as to the items, acts, or transactions which the prosecution intended to prove on the trial to support it. The offense is a single act crime, and does not rest upon a course of conduct. The accused is entitled to be informed of the nature and cause of the accusation against him; and whenever a general indictment is good as a pleading, the accused is entitled to demand a bill of particulars specifying the details of the general charge against him. In this case there were no preliminary proceedings of any kind from which we could learn any of these details. On Thursday, May 4, 1905, we therefore filed our motion and affidavit (R. 7-8) for a bill of particulars of acts and evidence, which came on for hearing (R 17, 29) on Monday, May 8, 1905, at 10 o'clock a. m. (R. 28), to which the prosecutor objected for want of two clear days' notice; "but the court requested to hear the point of the motion, and after hearing the said motion read and argued, declined to grant it, because the court concluded that it was without merit; and then the said objection was by the court sustained; to which ruling of the court the defendant duly noted his Exception 2" (R. 29). How intensely this ruling injured us is plain from this record, especially as to the alleged acts of embezzlement (*infra*, Conversion). By all of the authorities, our motion should have been granted; but, as a matter of fact, it was overruled (R. 17).

(2) Where it is permissible to allege the offense of embezzlement in general terms, a bill of particulars should be furnished the accused on motion therefor. 15 *Cyc.* 513, 519. It "should ordinarily be granted wherever the accused is liable to be surprised by evidence for which he is unprepared". *McKnight* v. *U. S.*, 97 Fed. 308, 213 (C. C. A.; embezzlement; some particulars alleged; the motion sought the further particulars of the alleged conversion). In a criminal case a bill of particulars is required whenever the indictment fails to give notice of the special matter intended to be proved. *Williams* v. *Com.*, 91 Pa. St. 493, 502 (perjury).

> "The order should never be refused where the court can see any reason to believe such particulars necessary to inform the defendant of the particular transactions, or instances of embezzlement, intended to be proved

against him, so as to enable him to meet them." *People* vs. *McKinney*, 10 Mich. 54, 92.

"There should always be such certainty as the nature of the case permits, in order that the defendant may have reasonable opportunity to be prepared with his defense; and where the allegations of the plaintiff are general and vague, and it is reasonable to presume that he could be more precise in his statements, an order for a bill of particulars ought to be granted, if demand be made in good season." *Vansant* vs. *Lindsley*, 2 App. D. C. 421, 423 *(crim. con.)*.

"It seems to be well established that in cases of this and kindred character, the trial court may, on motion of the defendant, require the prosecution to file a bill of particulars informing the defendant with more certainty than is found in the information, in respect of the times, places and circumstances of his offense. * * * And it would seem to follow that specifications ought to be ordered in all cases where it may be made to appear that the nature and circumstances of the offense charged reasonably admit of more definite assignment; and also, that the defendant may be embarassed and prejudiced by reason of the unnecessary generality of the charge against him." *Lauer* vs. *D. C.*, 11 App. D. C. 453, 454.

This case also notes the distinction between a single act offense and one consisting of a course of conduct, the former requiring the bill but the latter not always. An indictment in general terms, and without any particulars of the alleged offense, or specific acts which the prosecution will offer in evidence as the essential facts of the offense charged, depends for its constitutional validity upon the power and duty of the court on motion to order a bill of particulars to the accused, as in all criminal prosecutions he has the constitutional right to demand that he be informed of the nature and cause of the accusation against him. *Com.* v. *Bennett*, 118 Mass. 443, 452. *Com.* v. *Wood*, 4 Gray, 11, 13. *State* v. *Rowe*, 43 Vt. 265, 267. *Thalheim* v. *State*, 38 Fla. 169, 178-182.

"What information does the indictment convey? * * * I certainly do say that the prosecutor, in a case of embezzlement, ought, in justice to the prisoner, to give him much more information than the indictment

contains. * * * If the necessary information be refused, I will * * * grant an order, and put off the trial." *Lord Vaughn* in *Rex* vs. *Hodgson*, 3 Car. & P. 422, 423.

The accused is entitled to be informed seasonably before the trial what specific acts, items, or transactions will be offered in proof to sustain the charge against him.

"Where the charge in an indictment is a general one, as is usually the case in an indictment of this character, it is a matter of great importance to the defendant to obtain a bill of particulars, in order that he may know specifically what he will be required to meet on the trial." *McDonald* vs. *People*, 126 Ill. 150, 158.

"It is now a general rule, perfectly well established, that in all legal proceedings, civil or criminal, bills of particulars, or specifications of facts, may and will be ordered by the court whenever it is satisfied there is danger that otherwise a party may be deprived of his rights or that justice cannot be done." *Gilmore* vs. *People*, 87 Ill. 128, 133.

"This motion was in the nature of an application for a bill of particulars, which is demandable in all kinds of actions and proceedings, where, by reason of the generality of the claim or charge, the adverse party is unable to know, with reasonable certainty, what he is required to meet. * * * The rule applies to criminal proceedings as well as civil. * * * The practice in this respect is founded upon the clearest principles of justice, and should not be departed from in any case where the circumstances require an application of the principle." *C. & N. Ry. Co.* vs. *C. & E. Ry. Co.*, 112 Ill. 589, 604. 1 *Tidd's Pr.* 334.

"Whenever the indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court will, on his application, require the prosecution to furnish him a bill of particulars of the evidence to be relied upon." 3 *Wharton Cr. Law*, Sec. 3156.

"Question is also raised as to the ruling of the trial court in the matter of the application of plaintiffs in error for a bill of particulars. * * * It is enough to

say that, under the rule of procedure in this State, plaintiffs in error would be entitled to such a bill of particulars upon motion." *Towne* vs. *People*, 89 Ill. App. 258, 286.

If the information does not give the details, the defendant should have a bill of particulars if asked for. *Trometer* v. *D. C.*, 24 App. D. C. 242, 250. *State* v. *Mannix*, 9 Ohio Decisions (Reprint) 667, 670 (embezzlement). Many of the cases cited hold the bill to be a matter of substantial right, especially the Illinois cases, while others hold it to rest in the sound discretion of the trial court.

"Whenever an indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court, on his application, will require the prosecution to furnish him with a bill of particulars specifically showing the nature of the charge against him." *Thalheim* vs. *State*, 38 Fla. 169, 180 (embezzlement). *New Orleans* vs. *Chappuis*, 105 La. 179, 180. *State* vs. *Hatfield*, 66 N. J. L. 443, 444. (embezzlement). *Jules* vs. *State*, 85 Md. 305, 309 (false pretenses).

(3) All of the cases agree that the refusal of a bill of particulars is reviewable if there has been an abuse of discretion, and a substantial injury has resulted to defendant. *People* v. *McKinney*, 10 Mich. 54, 93 (top). *Vansant* v. *Lindsley*, 2 App. D. C. 421, 423.

"However, we are not called upon now, nor are we prepared to go to the length of holding that there may not be cases of such palpable abuse of discretion, working manifest injustice, that would require an exception to be made to this general rule." *Lauer* vs. *D. C.*, 11 App. D. C. 453, 455.

On the other hand, some of the cases first cited hold the bill a matter of right, and hence reviewable on appeal.

In *Gilmore* v. *People*, 87 Ill. 128, 131, the court said:

"We cannot concede the position taken by the State that an application for a bill of particulars is always addressed to the mere discretion of the trial court, and that its exercise thereof is never subject to review. * * * The hardship entailed upon defendant by the

denial of the bill of particulars was obvious at the trial. * * * It is obvious the refusal of a bill of particulars deprived him of information to which he was entitled before the trial. For this error the judgment must be reversed." *Thalheim* vs. *State*, 38 Fla. 169, 181, 182. *State* vs. *Rowe*, 43 Vt. 265, 267. *Com.* vs. *Wood*, 4 Gray 11, 13. *Com.* vs. *Bennett*, 118 Mass. 443, 452.

(4) This record makes it clear beyond question that our motion for a bill of particulars should have been granted, either as a matter of right or sound discretion; and that in either aspect the exception to the ruling (R. 29, Ex. 2) of the trial justice should be entertained and sustained as reversible error. The injury to us, resulting from the refusal, becomes distressing when we come to consider the alleged evidence of conversion (R. 38-41, 48, 53, *infra*, Conversion). The trial began (R. 29) only a few moments after our motion was denied. We could only stop, look ,and listen, not having the slightest idea of what was coming. The granting of our motion would have gone very far to prevent some of the gravest errors in this record of the alleged trial.

In *Com.* v. *Roberts*, 22 Pa. Co. Ct. Rep. 214, the defendant was indicted in a single count for embezzlement, and a bill of particulars was asked for and granted. The indictment alleged the embezzlement of one certain sum of money on one certain day; but the bill furnished showed that this was a gross sum composed of the aggregate of numerous small sums, and it did not set forth any charge of a distinct embezzlement, but only an aggregate of many items and acts. The accused then moved for a more specific bill. The court said (p. 216, bottom) that if a single count in embezzlement comprehends a large number of distinct acts, it cannot be maintained or prosecuted; that some single, distinct act must be alleged and proved to sustain a verdict and judgment against the accused, and to this point the court quotes (p. 216) *Com.* v. *Koons*, 1 Kulp 134, and 2 *Bish. Cr. Pro.* Sec. 251 (both of which are directly in point), and then proceeds (pp. 217-218) to discuss this subject carefully. The statute of the State (p. 216) permitted the prosecution to proceed in a single count for not more than three distinct acts of embezzlement which may have been committed by the accused within six months from the first to the last of such acts. Among other things, the court said (pp. 216, 217, 218):

"This is a charge of embezzlement, set forth in a single count of an indictment, wherein there is no averment of any separate or distinct offenses, but as the bill of particulars and admission of the district attorney seem to show, of an embezzlement of a total sum of money received at divers times and as the result of numerous distinct acts * * * .

"While the various items set forth [in the bill of particulars] might, many of them, be evidence to establish some distinct act of embezzlement, the Commonwealth by them shows that in the pleadings there is not set forth any charge of a distinct embezzlement which the defendant must meet, but only an aggregate of many acts and items. * * *

"The Commonwealth will be required to furnish a statement of one or more distinct acts of embezzlement for which it proposes to prosecute the defendant upon these bills [of indictment]."

In the case at bar, the identical situation in effect is presented, as shown by the indictment (R. 1-2) and the proof (R. 36, 38-41). At various times the receivers secured from various persons various amounts, aggregating a gross sum of $24,415.13, and also the further sum of $1,532.26 (R. 36); of this sum $10,070.82 was allowed to them (R. 36) for commissions, costs, and charges; the sum alleged in the indictment is the paper balance of this gross sum, allowed by the auditor (R. 36-37) to the four distributees named in the sixth count of the indictment; and the evidence is supposed to be (R. 38-41) that this money was drawn out of one certain bank (not embezzled) at different times, by no less than ninety-two separate and distinct acts, each of which was offered and received as proof of a substantive act of embezzlement by the accused, over his objection and exception (R. 41, Ex. 14); no election among these numerous acts was ever made by the prosecution, but the trial judge actually charged the jury in terms (R.69-70) that they might convict of one or more or all of them.

We have no statute here which dispenses with the particulars of the alleged embezzlement, so as to allow a series of acts, or all the evidence of what the accused did, to go to the jury without election, leaving them a license to convict on the whole if they shall believe the accused guilty. Such statutes exist in some of the States—Illinois, Iowa, Florida, Massachusetts, Ohio, Alabama, California, Ver-

mont, and perhaps some others. Their constitutionality is still open to question.

The appellate judge says (R. 77) that this one count of the indictment is "sufficiently certain in its terms", to apprise the accused that he must be prepared to meet and defend against ninety-two distinct, substantive acts of alleged embezzlement, forty-three of which (R. 39) "were prior to January 1, 1902"—the date when the code took effect—and without the statute of limitations—three years; and he also says (R. 77) that the matter was "within the discretion of the trial court; and there is nothing to indicate the slightest abuse of that discretion." This conclusion is in line with the doctrine of the Court of Appeals that reversible error is practically impossible in criminal cases if the accused is convicted. We think there was the grossest abuse of discretion in the premises.

What information, even the slightest, does the indictment give us as to any specific act or evidence that will be offered to prove the charge? How could we be expected or required to defend against every one of the ninety-two items put in evidence, covering eight and one-half years, with no election at any time of any act relied on for conviction? Could not the pleader have been more specific? Could we anticipate or be prepared to defend against all of the alleged evidence of conversion (R. 38-41) that was received? Comparison of the indictment and proof answers emphatically in the negative. The guaranties of the Fifth and Sixth Amendments, as to indictments for crime and information as to the nature and cause of the accusation, cannot be denied under the guise of refusing a bill of particulars, and the order be not subject to review; for this would permit the trial court's discretion to override the Constitution. Either this indictment or the denial of particulars violates the fundamental rights of the accused.

Had this been a petty case before a justice of the peace, involving a few cents, the following Rule 4, prescribed by the trial court in general term, would have controlled:

> "In every action to recover money the plaintiff shall file a bill of particulars showing the nature and items of his claim, with a copy thereof to be served on the defendant with the copy of the summons; and if the same be not so filed, the defendant shall be entitled to a continuance at the cost of the plaintiff, who shall be al-

lowed a reasonable time to file the same, and upon his failure so to do within such time, the cause shall be dismissed at the cost of the plaintiff."

V. CONTINUANCE.

(1) The denial (R. 29, Ex. 3) of our motion for a continuance (R. 10-16) "for a reasonable time", effectually killed the order (R. 7) for commission and letters rogatory, and deprived the accused of his affirmative defense on the merits and of the assistance of counsel, and left him the subject of a practically *ex parte* trial. Our application recites all (R. 10-11) the prior proceedings; the many consultations day and night between the accused and his counsel; the materiality and details of the testimony of his non-resident witnesses (R. 11-14); the immediate retainer of his counsel (R. 14); that he has a good and valid defense, the nature of part of which will require examination of an elaborate account and many papers, many of which have become intermingled through no fault of his, with a large mass of others, and which it will take some time and labor to find (R. 14); that various proceedings at law and in equity and in other courts are involved, some of which are intricate, but essential to be understood by his counsel (R. 14); the prosecutor has had all of the material papers and records in Eq. 15907 in his exclusive possession in his office ever since the indictment was returned, if not longer (R. 14-15); we cannot properly prepare for trial without opportunity freely to inspect said papers and records and others mentioned (R. 15) "which opportunity they have not had"; another obstacle was the prosecutor's order to the Trust Co. not to show, or give us any information about, certain material checks, certificates and accounts, and his request for delay on our application to him for permission to see the same (R. 15); the preliminary proceedings have occurred with such unusual haste and rapidity as to take up all our time, and "reasonable time and opportunity are now required to prepare the case for trial on the facts; that affiant's counsel do not yet know of the material facts or the details of such facts in this case, as neither affiant nor they have had any reasonable time to collect them or the parol and documentary evidence to support them" (R. 15); he has been compelled to attend to calls for papers and information required by local

courts in other cases (R. 15); he has given an average of fifteen hours per day to this case, and sometimes twenty-four, and twice had to be out of the city about it (R. 15); if his New York witnesses were summoned here it would require some short time for them to produce the documentary evidence required (R. 15-16); and in conclusion "that this application for continuance is made in good faith, and not for the purpose of delay; and that this defendant desires a trial as soon as he reasonably can prepare for it" (R. 16). This is a brief statement of the substance of the accused's affidavit for continuance, which lacks the details and force of the original (R. 10-16), to which we earnestly invite this court's attention. This affidavit is fully supported by those of Messrs. Baker and Walker (R. 16), saying also "that they are not prepared for trial of this case on May 8, 1905, although they have devoted all the time and attention to it that they reasonably could; that they have exercised unusual diligence in this cause, and a reasonable continuance is absolutely necessary in order to prepare properly for trial; and that *without such continuance they can be of no substantial service to the said defendant* on trial on May 8, 1905." Please see also our affidavit (R. 22-24) in support of our motion for new trial (R. 20-22) and that motion itself. Mr. Beach's affidavit (R. 17) is forceless in face of the above six affidavits and the recital of the bill of exceptions (R. 28) that on "last Thursday [May 4] the United States Attorney had invited the defendant and his attorney to examine the papers at any time in his office." One of the necessary effects of refusing the continuance led to this argument by the then assistant prosecutor, to the jury (R. 65); "And you have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense." The accused was entitled "to have the assistance of counsel for his defense"; yet, by no fault of theirs, he only had their presence, and was denounced to the jury for the error of the court in depriving him of their assistance. This record is evidence of his counsels' ability, zeal and fidelity, under circumstances so adverse and unfair as to justify any lawyer in withdrawing from the case; but be it said to their credit that they refused to do so, and did their best.

(2) The *Maryland Declaration of Rights*, Sec. 19, says "that in all criminal prosecutions, every man hath a right to be informed

of the accusation against him; to have a copy of the indictment, or charge, *in due time,* (if required), *to prepare his defense.*" The accused is entitled absolutely to reasonable time to prepare his defense; and this applies to all crimes, however heinous. 12 *Cyc.* 503, 535, and many cases cited. In *Allen* v. *United States,* 115 Fed. 3 (C. C. A.), a motion of defendant for continuance to get the testimony of an absent witness was denied, by which he was deprived of it, and the conviction was reversed (p. 13) because "the defendant did not have a fair and impartial trial." The denial was excepted to and this exception was considered on appeal. The opinion is a powerful demand that every accused person shall have a fair and impartial trial, and every word of it is applicable to this record. The defendant must have compulsory process for his witness, "with reasonable time and opportunity to obtain the benefit of the same." *Adkins* v. *Com.,* 98 Ky. 539, 556 (in which the conviction was reversed for refusal of a continuance in order to give the accused reasonable time to get the testimony of material absent witnesses under compulsory process awarded for that purpose). We were not only denied any time or opportunity to obtain any benefit from the order (R. 7) for commission and letters rogatory, but were even unable to get our local witnesses Tichenor and McConville (R. 18). The commission and letters rogatory were "compulsory process for obtaining witnesses in his favor", for words in the Constitution are presumed to have been used in a broad sense with a view of covering all contingencies, and do not ordinarily receive a narrow and contracted meaning. *In re Strauss,* 197 U. S. 324, 330. "No narrow or illiberal construction should be given to the words of the fundamental law" as to the rights of the accused. *Ex p. Lange,* 18 Wall, 163, 178. If the Government had asked for a continuance in this case on the same or less or no showing, would it have been denied? Yet the Sixth Amendment was made to protect the accused, not the Government.

(3) An order denying a continuance will be reviewed an error or appeal if there has been an abuse of discretion by the trial court. *Foertsch* v. *Germuller,* 9 App. D. C. 351, 356. *Isaacs* v. *United States,* 159 U. S. 487, 489. *Goldsby* v. *United States,* 160 U. S. 70, 71. *Means* v. *Bank,* 146 U. S. 620, 629.

> "The discretion which a trial court exercises must be judicial and not arbitrary; it is the guardian of the

rights of the accused as well as of those of the people at large, and should not unduly force him to trial. * * * It is not necessary, to constitute abuse, that the court acts wickedly or with intentional unfairness. * * * Where it is shown that the evidence of the absent witnesses is material and admissible; that the testimony, in view of the established facts, is not probably untrue; that their attendance can probably be secured at another term; that the facts expected to be proved cannot be obtained from other disinterested witnesses; and that the defendant has exercised proper diligence to procure their attendance, a denial of a continuance under such circumstances would operate unfairly to a defendant, would deprive him of a fair and impartial trial, and would, therefore, constitute reversible error. * * * A refusal to grant a continuance because of an absent witness merely on the ground that there were other witnesses to the difficulty is error, where it appears that the testimony of the absent witness is material and important. * * * The non-residence of a witness does not of itself justify the court in refusing a continuance where the statute provides for obtaining testimony by deposition. * * * The question is not merely whether or not the court will be able to coerce or enforce the attendance of the absent witness; if there is reasonable ground to believe that such witness will be had by a continuance it should be granted, although he be without the State. * * * An application for a continuance to procure record evidence or depositions rests substantially on the same merits as when made because of the absence of witnesses. * * * Where a party has fulfilled all legal requirements, a refusal to grant a continuance to enable him to secure such evidence is error. * * * And it of course goes without saying that no convenience of the court, or condition of the docket of the cases for trial, or statutory enactment, can authorize the denial of any of the rights guaranteed to a party by the Constitution of the United States. * * * The constitutional guaranty to an accused of the right of compulsory process for the attendance of his witnesses should not be trifled with or made a dead letter, and no rule of practice or statute can be applied or so interpreted as to contravene this guaranty, or deny the right to such process, and a reasonable time for its service or execution. * * * Where no lack of diligence is shown, either on the part of the

accused or his counsel, it is reversible error to refuse to grant a continuance where it is clear that counsel have not had sufficient time to investigate and examine the law applicable to the case. [The reason being that to deny a continuance in such a case would be to convert the inestimable right guaranteed a party charged with crime of the assistance of counsel into a meaningless formality.]

"* * * The accused, however, must be accorded all reasonable facilities in the preparation of his defense. * * * It is agreed that the failure to prepare for trial and subpoena witnesses before an indictment or information is found is not such lack of diligence. * * * A continuance should not, however, be refused on purely technical grounds [*Trevinio* vs. *State*, 1 Tex. App. 72, 74, in which a continuance was refused because the indictment was for the theft of a gelding, and the affidavit for continuance called it a horse, and the conviction was reversed for refusal of the first continuance asked.] * * * An application for a continuance on the ground of absent witnesses * * * must specifically set forth the facts expected to be proved by such witnesses so that the court may judge of the materiality of the same—* * * facts to which it is expected an absent witness will swear. * * * The affidavit must also aver that the affiant believes that the testimony which he expects the absent witness to give is true. * * * Counter affidavits will not be received. * * * Although the court, when judged by the facts and evidence before it at the time of passing on the motion [for a continuance] may be held to have exercised a sound discretion in its refusal, yet, if, when all the evidence is in and everything transpiring at the trial of the cause is considered, it is clear that defendant's rights have been prejudiced, the court must remedy its mistake by granting him a new trial."

The foregoing quotation is from an elaborate article on continuances in criminal cases in 9 *Cyc.* 163-269, in which the cases are fully collated.

A decision denying a continuance may be reviewed on exception. 2 *Cyc.* 719. 3 *Cyc.* 161, 334. If the defendant has a defense, the benefit of which has been denied him, the appellate court will reverse and remand for this reason alone, even though such denial has re-

sulted from his own careless conduct. *Wagenhurst* v. *Wineland*, 22 App. D. C. 356, 367. *Wiggins Ferry Co.* v. *Ohio & M. Ry. Co.*, 142 U. S. 396, 413.

The trial judge gave (R. 29) no reason whatever for denying the *only continuance asked*, but the appellate judge (R. 78-80) is at some pains to justify this summary ruling. He says (R. 78) that we asked "for continuance to procure the testimony of three witnesses, two of whom resided in New York City, and one was then somewhere in Europe, where he expected to remain for two years."

The desire to get the testimony of our non-resident witnesses was only one of the many equally important grounds of which our motion was predicated, such as the unpreparedness of counsel, the denial of inspection of the equity papers, the temporary loss of important papers, etc., but of the others the appellate judge significantly says nothing whatever. Our motion (R. 5) for letters rogatory says that Charles F. Miller is "a resident of and now to be found in the city of London, England, being a material witness for this defendant." The affidavit in support (R. 5-6) repeats this statement, and adds (R. 6) "that the address of the said Charles F. Miller is care of R. Hoe & Co., London, England"—not merely "somewhere in Europe", as the appellate judge (R. 78) puts it. Our affidavit for continuance recites (R. 11) "that it has required some time and effort on the part of affiant to locate Charles F. Miller, named in the said motion for letters rogatory, as the said Miller left this District in the year 1904 to go to Lisbon, Portugal, and on information and belief, will not return until about two years from now."

R. Hoe & Co. are well known throughout the whole civilized world as the leading manufacturers of printing presses, and Miller's given (R. 6) address "care of R. Hoe & Co., London, England", was absolutely certain and definite, he was there and would be there when the letters arrived, and we knew it. Miller returned to this city only a few months after the order for the letters rogatory—and he has been here ever since, and will remain here indefinitely, and will testify positively to the facts stated.

The proposed evidence of Gilbert and Hotchkiss, sought under the commission, was not incompetent, but as we insist that the prosecution's proof in this case affirmatively disproved the ownership as laid in the third count upon which this judgment rests, we shall not now discuss the question.

Miller's testimony, the appellate judge says (R. 79), "does not show a good defense". It was only intended to supplement other evidence proposed to be offered (R. 13). The affidavit for letters rogatory recites (R. 6) "that by the said Miller this defendant will prove that a large part of the said money passed lawfully into the exclusive manual custody and control of Andrew A. Lipscomb, named in the said indictment, for the sole purpose of *bona fide* investment thereof by him in certain safe securities, and that this defendant did not convert the same or any part thereof to his own use." The affidavit for continuance recites (R. 12-13)) that the accused "expects to prove by the said Miller that a certain large part and specific sum of the moneys alleged in said indictment to have been converted, passed lawfully into the exclusive possession, custody and control of the affiant's co-defendant on or about June 20, 1903, for the sole purpose of *bona fide* investment thereof by said co-defendant in certain safe securities, and that the same never came into the exclusive possession or control of this defendant, and that this defendant did not convert the same or any part thereof to his own use—this proof to supplement other evidence proposed to be offered as to the lawful disposition of all the moneys mentioned in the said indictment, so far as this defendant is concerned," etc. There was no admission by the prosecution of any of the facts which we expected to prove by our non-resident witnesses.

The appellate judge's statement (R. 79) that " by all three witnesses" the accused expected to prove the non-ownership of the Association, named in the third count, is incorrect, for Miller's testimony had no reference whatever to the ownership. He further says (R. 79) that "as to the witness Miller, his location was uncertain"; yet we showed his exact location (R. 6); that (R. 79) "there was nothing to show a reasonable probability that his evidence could be procured within any definite period if at all"; yet we showed the very contrary, and there was absolutely nothing to contradict our showing. His testimony could and would have easily been taken and returned within one month from the time the letters went out; but we were given no chance whatever to get it. Then the judge says (R. 79) that " the particular facts that he was expected to testify to were not stated"; but they were, and he himself states (R. 79) part of them from our own showing. We even referred (R. 13) to our *filed interrogatories to Miller*—"Affiant further says that he

is advised that while it is proper that he should state herein the facts which he proposes to prove by his said non-resident witnesses, it is not necessary that he should recite at length the details of their evidence, and the documents tending to prove such facts; and affiant therefore refers for any such or further details, to his filed interrogatories to the said witnesses" (R. 13). These interrogatories were included in full in the transcript of record filed in the Court of Appeals (R. 72, items 9, 10, 11); but were not printed because we thought it unnecessary (R. 74), as we have said.

The judge further says (R. 79-80) that "the general statement that he [Miller] would testify that a large and specific sum of the moneys had passed lawfully into the hands of defendant's co-receiver, for the sole purpose of *bona fide* investment, does not show a good defense"; but the statute requires that the accused shall fraudulently convert the money *to his own use*. Why, then, was Miller's proposed testimony immaterial? Had it no relevancy or legitimate bearing even upon the question of the fraud required? Or upon the inquiry whether the accused converted the money "to his own use"? Was it no defense for the accused to show that he "did not convert the same or any part thereof to his own use"? The law is and must be otherwise. *Burnett* v. *State*, 62 N. J. L. 510, 513. 15 *Cyc.* 510. In considering the alleged conversion *infra*, we cite many other cases bearing upon this point. Necessarily the judge cites none to support his radical conclusions. In the *Burnett* case, *supra*, the court said (p. 513):

> "The court below refused to admit evidence tending to show that such residue [the controversy under the indictment for embezzlement was whether or not the accused had fraudulently taken and converted to his own use $1300, the residue of a fund of $3000 received by him as bailee, agent and servant] had, without the knowledge or consent of the defendant, been misappropriated by his son, with whom he was associated in the real estate business, and who was authorized to draw against the special bank account of said business in which the fund had been deposited. * * * The defendant is entitled to assign error upon it in view of the distinct ruling of the court that proof of a misappropriation by an agent would not relieve the defendant under the statute. Civil liability was thereby confused with criminality. To warrant a conviction under a stat-

ute like that *sub judice* a fraudulent intent is essential. *The excluded proof was legitimate on that subject, and the defendant was entitled to have it considered by the jury.* Let the judgment be reversed."

The court below proceeds (R. 80):

> "The funds were in the possession of the receivers jointly, and subject to the control and disposition of the court. They had no authority to pay them out or to invest them in securities of any kind save upon order of the court; and it is not pretended that such an order was made."

Not only one, but at least fifty such orders were actually made and obeyed, and all of the disbursements made under them were received in this case as evidence (R. 38-41) of their embezzlement by the accused. Some of these orders directed many payments, others but one. Some were general, others special. The prosecutor had all of them among the papers and records removed by him; and two such disbursements were made (R. 39) under an order of the Court of Appeals itself (21 App. D. C. 344, 369), and they too were received as evidence (R. 38, 39) of embezzlements by the accused of the amount of each.

The appellate judge further says (R. 80):

> "Nor could one of them draw the money from the bank of deposit without the other's signature";

but one could and did lawfully act for both in a very few instances, by express authority (R. 40) of his co-receiver, and in cases of emergency. The law permits this. *Ubhoff* v. *Brandenburg*, 26 App. D. C. 3, 7. *Howard Ins. Co.* v. *Chase*, 5 Wall. 509, 514.

He then concludes (R. 80):

> "It would be an extreme case that would require a court to continue a case indefinitely for the purpose of procuring evidence, even if shown to be plainly competent and material";

but we did not ask the trial court to continue the case indefinitely, but only (R. 10) "for a reasonable time, for the reasons set forth", of which the testimony of the non-residents was but one.

The appellate judge in effect holds that on an infamous charge the innocence of the accused is no defense, and therefore he is not

entitled to a continuance to prepare for trial, or to get the necessary evidence to prove it. The court below becomes even more radical in its consideration (R. 82-83) of the alleged proof of fraudulent conversion, and falls into a sharp conflict with the trial judge (R. 55-56) on the effect of the witness Mead's testimony, which it says (R. 83) shows of itself a fraudulent conversion as to that item, but which in the jury's presence the trial judge (R. 56) said showed "an absolute defense to that item."

The trial judge, as we have said, did not attempt to give any reason whatever to justify his refusal of a continuance. It was plainly impossible for him or any one else to give any good reason for his arbitrary ruling. His silence, however, affords far more excuse for his remarkable action than the alleged reasons stated by the appellate judge. There was a gross abuse of discretion in the premises. The accused was deprived of all of his home-born rights, under the guise of denying him a continuance. *He was simply railroaded to conviction at any cost, without the slightest chance to make any affirmative defense on the merits.* No case can possibly be sufficiently irritating to warrant any court in ignoring the Sixth Amendment. If the accused was not entitled to a reasonable continuance in this case, none can be conceived.

Mead's testimony (R. 54-55) was of identically the same character as that sought from Miller, and the trial judge held it material (R. 56) on a direct motion of the prosecution to strike it out; but the appellate judge takes the very contrary view (R. 83), in order to find some excuse for the refusal of the continuance. If Mead's testimony was material—and both judges held it to be so (R. 56, 82, 83)—then Miller's must have been so too.

Had the appellate court construed section 841 with one-tenth the strictness it applies to our motion for continuance, we should have reached the end of this case long ago; but all convictions must be affirmed. *Ipse dixit.*. In *Clyatt* v. *U. S.*, 197 U. S. 207, this court said (p. 222):

> "Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

The record in this case shows no respect whatever for that principle.

VI. EFFECT OF PLEA.

The plea of not guilty (R. 17-18, 29) put in issue every material allegation of the indictment, and denied the truth of the evidence against the accused. *People* v. *Everhardt*, 104 N. Y. 591, 595. In *U. S.* v. *Taylor*, 11 Fed. Rep. 470, the court said (p. 494):

> "By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the Government have sworn to. This is so, notwithstanding the fact that no witness for the defendant contradicted the statements of the witnesses for the prosecution."

VII. THE RECEIVERSHIP.

(1) The Pleading.

Under section 841, and all the decided cases, the fiduciary capacity is an essential element of the offense, and must therefore be properly averred. This indictment (R. 1-2) alleges that on Nov. 23, 1903, the accused "were receivers, that is to say, were receivers under a certain order of the Supreme Court of the District of Columbia, holding an equity court, dated the sixth day of November," 1894, in Eq. 15907, entitled, etc. No other facts or particulars of the alleged receivership are given; but it is not only necessary to aver the receivership, but also the particulars thereof.

(*a*) That the fiduciary capacity is an essential element of the crime, and must be strictly stated, is well settled. *Moore* v. *U. S.*, 160 U. S. 268, 272. *Green* v. *U. S.*, 25 App. D. C. 549, 551. *State* v. *Knobles*, 43 La. Ann. 200, 202. 15 *Cyc.* 519. *Washington* v. *State*, 72 Ala. 272, 276. *Griffin* v. *State*, 4 Tex. App. 390, 416. *State* v. *Bailey*, 50 Ohio St. 636, 645. *McConn* v. *U. S.*, 2 Wyo. 267, 286. *Grin* v. *Shine*, 187 U. S. 181, 196. *State* v. *Carmean*, 126 Iowa 291, 295.

(*b*) It is equally well settled that the particulars of the alleged fiduciary capacity must be set out in the indictment, and especially the purpose for which the property or money was intrusted or delivered to the accused; otherwise it is fatally defective. *Com.* v. *Smart*, 6 Gray 15, 16 (approved in *Moore* v. *U. S.*, 160 U. S. 268, 272). In *State* v. *Griffith*, 45 Kan. 142, the court said (p. 144):

> "The mere allegation that he was a bailee [here receivers] is too general and indefinite, and does not fairly inform the defendant of the nature and cause of the accusation against him. The information should state who placed the property in the hands of the defendant, the purpose or use to which it was to be applied, and the time within which the purpose was to be carried out, or the time within which the property was to be returned."

(*c*) This indictment (R. 1-2) gives no particulars of the alleged receivership; nothing is stated as to what the receivership order included; from the face of the pleading, it is impossible to say whether the order authorized the accused to receive any money, or what money or property, or for what purpose, or with what power or authority they were appointed as receivers; all connection between the recited money and order is left wholly to intendment and implication there is no allegation that the accused ever qualified or acted as receivers; the pleading gives nothing more than a mere reference to a collateral source of information, instead of stating the essential facts themselves.

The indictment attempts to allege that the accused were *de jure*, and not *de facto* receivers.

(*d*) It is also essential that an indictment for embezzlement shall particularly describe the property which is the subject of the trust and alleged to have been embezzled. *Com.* v. *Smart*, 6 Gray 15, 17. *People* v. *Cox*, 40 Cal. 275, 277. *State* v. *Stimpson*, 24 N. J. L. 9, 28. 12 *Ency. Pl. & Pr.* 977. In *Moore* v. *U. S.*, 160 U. S., 160 U. S. 268, the court said (p. 272) that "the property embezzled must be identified with great particularity"; and further said (p. 274):

> "The property embezzled should be identified with particularity, the general rule in the absence of a statute being that an averment of the embezzlement of a certain amount in dollars and cents is insufficient."

This rule applies to all indictments against private persons or officers, of whom a chancery receiver is one; but this indictment (R. 1-2) merely describes the property as money without more, and contains only "an averment of the embezzlement of a certain amount in dollars and cents."

(c) These and the other defects of the indictment are pointed out by our demurrer (R. 2-4), and therefore they are not aided or cured by the verdict (R. 18). *Moore* v. *U. S.*, 160 U. S. 268, 276. *U. S.* v. *Johnson*, 26 App. D. C. 136, 140. In addition, the omitted "particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict". *U. S.* v. *Hess*, 124 U. S. 483, 488-489. Substantial defects of the indictment are also set out in our motion in arrest of judgment (R. 16), including the omission to aver the qualification of the accused (R. 19, par. 3), and this omission is also made one of the grounds of our motion for new trial (R. 21, par. 8). It may have been intentional, in view of the evidence.

(2) The Proof.

(a) It is, of course, necessary to prove the alleged *de jure* fiduciary capacity strictly as laid; or, as the court said in *McNish* v. *State*, 88 Ga. 499, 500:

> "In order to convict the accused it was necessary to prove the creation of the trust described in the indictment, and a fraudulent breach of it in the manner alleged. To charge one trust and prove another would not suffice."

In *State* v. *Bailey*, 50 Ohio St. 636, the court said (p. 645):

> "It is true that it is the act of conversion that gives to the transaction its odious and repugnant character, but proof of the contract establishing the relation is no less important than is proof of the conversion itself."

This proof cannot be dispensed with, nor supplied by the doctrine of estoppel, for the statute imperatively requires the fiduciary relation to be an actual fact. The accused cannot be estopped from questioning or relying upon the fatal defects of the Government's proof; and it is settled by authority and sound reason that there is no estoppel of the accused even to deny affirmatively his authority or fiduciary relation in the receipt of the money or property. 10 *Am. & Eng. Ency. Law* 992, and cases collated. A chancery receiver is the officer of the court, and not the agent of the parties.

The receivership order (R. 31) recited in the indictment (R. 1-2), as a condition precedent requires the appointees to qualify by giving separate bonds; and it was therefore absolutely necessary for the Government to prove that the accused had given the bond required in order to show that he was a receiver as alleged; for an appointee without qualification is no more a receiver than is one by qualification without appointment. *Frayser* v. *Richmond Ry. Co.*, 81 Va. 388, 390, 393. *Phillips* v. *Smoot*, 1 Mackey 478, 486. *Moran* v. *Morgan*, 154 U. S. 256, 283. *Chamberlain* v. *Rochester Co.*, 7 Hun. 557, 559. *Johnson* v. *Martin*, 1 Thomp. & Cook 504, 505. *In re Christian Jenson Co.*, 128 N. Y. 550, 553.

The charge of the indictment that the accused was a *de jure* receiver under the special order recited therein, is not met by proof that he was a *de facto* receiver, for the very trust and fiduciary relation alleged must be strictly proved. The court cannot reform this indictment. The evidence in this case did not show "that the defendant was a receiver as charged in this indictment", as the trial court peremptorily (R. 66) told the jury.

The Government wholly omitted to prove, or even to make an attempt to prove, the fact that the accused had qualified by giving the bond required, and therefore it failed to prove the *de jure* fiduciary relation alleged. The accused had the right "to rest upon the Government's omission of proof of that fact", as was said in *Clyatt* v. *U. S.*, 197 U. S. 207, 219. A *de facto* chancery receiver is unknown.

Section 841 applies only to *de jure* officers and employees. A chancery receiver cannot be created by estoppel. He is a private, not a public officer. What a court of equity could do with one appointed as a receiver who failed to qualify but acted as such, is beside the question, as is also the query whether that court could omit qualification, for here this order imperatively requires it.

One court cannot take judicial notice of the bond given by an appointee of another court in another cause though such bond has become part of the record of that case, but the bond itself must be produced and proved as the primary evidence of the fact of qualification. *Bank* v. *Beverly*, 1 How. 134, 151. *Downing* v. *Howlett*, 6 Colo. App. 291, 293. *Wagenhurst* v. *Wineland*, 22 App. D. C. 354, 366. No foundation for secondary evidence of qualification was laid or attempted to be laid in the present case.

(*b*) The question of receivership *vel non* was one of fact for the jury. *Com.* v. *Foster*, 107 Mass. 221, 222. *Com.* v. *Bennett*, 118 Mass. 443, 448, 454. *Green* v. *U. S.*, 25 App. D. C. 549, 551. *People* v. *Treadwell*, 69 Cal. 226, 230. This was so, notwithstanding no witness for the accused impeached the proof of the Government; for the jury had the right to pass on the genuineness of the documentary evidence offered, and the credibility of the prosecution's witnesses, whom they were not bound to believe. *U. S.* v. *Taylor*, 11 Fed. Rep. 591, 595. If the court had the right to charge peremptorily on the fact of receivership, it had an equal right so to charge on every other essential fact in issue, and thus destroy the right of the accused to trial by a fair and impartial jury, which in this and other respects was most effectually done in this case.

The trial judge told the jury (Prayer X, R. 60, Prayer XI, R. 61, Prayer XIII, R. 61, Prayer XV, R. 62) that the Government was bound to prove beyond a reasonable doubt that the accused was a receiver as alleged in the indictment, and that this was a question of fact to be decided by them; but after these prayers had been given, and after the arguments had been made that showed the Government's omission of proof in this respect, he promptly supplied the omission, destroyed the prayers, usurped the functions of the jury, and invaded the constitutional right of the accused to have the jury decide this fact, by peremptorily charging (R. 66) them as follows:

> "You may take it as a matter settled by the proceedings of that court that the defendant was a receiver as charged in this indictment."

(*c*) As there was no legal evidence that the accused was a receiver "as charged in this indictment", the trial judge should have directed acquittal. He had no right whatever to submit to the jury an alleged fact of which there was no evidence (*Burton* v. *U. S.*, 196 U. S. 283, 301. *Gassenheimer* v. *U. S.*, 26 App. .D C. 432, 447), and still less to charge peremptorily the existence of an essential fact in issue of which there was no legal proof. He should have granted our prayers (R. 59, Pr. 1, Ex. 35; R. 59, Pr. IV, Ex. 36) for a verdict of not guilty on all of the evidence in the case, for this reason alone, even if the many other fatal defects were absent. It may be said that this point is technical; but it is certainly no more so than that

which caused the reversal of the conviction in *Clyatt* v. *U. S.*, 197 U. S. 207, 219, in which the indictment charged a return of negroes to a condition of peonage, but the Government omitted to prove that they had ever been in such condition, whatever the actual fact may have been. The point was not made nor saved in the trial court, but this court noticed it as a plain error not assigned, and in concluding the opinion said (p. 222):

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

(*d*) If it be said that this defect of proof was not reserved in the trial court, the record answers to the contrary; and if it be said that this peremptory charge was not excepted to, the answer is that no exception is required for the review of a ruling which deprives the accused of a constitutional right; for in such case a conviction will be reversed and the case remanded for trial *de novo*, "notwithstanding there might not have been an exception taken to the illegal proceeding." *Price* v. *U. S.*, 14 App. D. C. 391, 404. In *Hopt* v. *Utah*, 110 U. S. 574, this court said (p. 579):

> "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial, to object to such unauthorized methods."

In addition, it is well settled that the appellate court may notice a plain error not assigned, in a matter prejudicial to the accused; and correct it by reversal, although the question may not have been raised by objection and exception to the action of the trial court. *Wiborg* v. *U. S.*, 163 U. S. 632, 658. *Clyatt* v. *U. S.*, 197 U. S. 205, 221. *Jackson* v. *U. S.*, 42 C. C. A. 452, 456. This right is freely exercised in criminal cases, because exceptions are required by rules of mere procedure and practice; and neither the law nor the court ex-

acts the life or liberty of the citizen as the penalty for a failure of his counsel to obey such rules, if he is thereby deprived of any substantial right. *State* v. *Pierce,* 8 Nev. 291, 304. In *Allen* v. *U. S.,* 52 C. C. A. 597, 606, the court said that "no technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right."

Moreover, when an exception to a certain ruling has once been taken, it need not be repeated to the charge, or to the same ruling made at later stages of the cause, but it will even reach back to the same ruling previously made and passed without objection or exception at that time. *Boyd* v. *U. S.,* 142 U. S. 450, 457. *Waldron* v. *Waldron,* 156 U. S. 361, 382. *Allen* v. *U. S.* 52 C. C. A. 597, 603. This is also the uniform rule of the state courts. It comes into play more than once in this case, and perhaps was in the mind of the appellate judge when he spoke (R. 81) of "many points made on * * * exceptions taken to the charge of the court", for the record (R. 65-70) is silent as to any repeated or special objections or exceptions to the charge, as every subject of objection to it had been fully covered by exceptions previously reserved.

(*e*) Although the foregoing objections to the sufficiency of the indictment and proof as to the alleged fiduciary relation were properly presented and fully argued in both courts below, yet the appellate judge did not deign to notice them at all in his opinion, just as he wholly ignored some of the most vital points in this case, to which we shall refer, and which we not only deem unanswerable, but which even no attempt to answer has ever been made by any of the judges below or the counsel for the Government.

VIII. THE POSSESSION.

Section 841 in terms requires possession by virtue of the office or employment, and it is necessary that an indictment for embezzlement shall aver such possession, or it is fatally defective. *Moore* v. *U. S.,* 160 U. S. 268, 270, 272. This indictment alleges (R. 2) that the money had come into the possession of the accused by virtue of their office and employment "as such receivers," as already mentioned.

If we are right in our contention that the Government omitted to prove that the plaintiff in error was a receiver "as charged in this

indictment," then it necessarily follows that it also failed to prove that the money had come into his possession by virtue of his office or employment "as such receiver."

Section 841 requires possession as such. It does not apply to cases of custody, charge or control. A mere custodian cannot commit embezzlement under this statute, by the settled law. The N. Y. Penal Code, section 528, includes "possession, custody, or control." An ordinary chancery receiver, such as we have in this case, is a mere custodian of the property, without "even the right of possession." *Union Bank* v. *Bank of Kansas,* 136 U. S. 223, 236. *Great Western Co.* v. *Harris,* 198 U. S. 561, 576. Section 841 was evidently designed to apply only to the receivers previously provided for in the code itself, by sections 773-780—that is, to statutory and not to so-called "common-law" or chancery receivers, as the former are not mere custodians, but get both possession and the right of possession by virtue of the statute.

IX. THE OWNERSHIP.

(1) Ownership Was Not in the Association.

(A) The Pleading.

The third count of the indictment (R. 1-2), of which this judgment is predicated, charges the money as *"being* the property and moneys of the Washington Beneficial Endowment Association, a body corporate."

(a) Under section 841, and the decided cases, the ownership must be alleged, so as to show that the money is "of the property or estate of any other person" than the accused. This is descriptive of the offense, and is an essential element, for one cannot embezzle his own property, under this statute, nor that of which he is a part owner; but it must belong exclusively to some other person.

That the allegation of the ownership of the property charged to have been embezzled is indispensable, cannot be questioned. *Grant* v. *State,* 35 Fla. 581, 585. *State* v. *Roubles,* 43 La. Ann. 200, 203. *Washington* v. *State,* 72 Ala. 272, 276. *Reeves* v. *State,* 95 Ala. 31, 41. 7 *Ency. Pl. & Pr.* 454. *Griffin* v. *State,* 4 Tex. App. 390, 415. *Crane* v. *State,* 26 Tex. App. 482, 483. *State* v. *Lyon,* 45 N. J. L. 272, 274. See *Kirby* v. *U. S.,* 174, U. S. 47, 61.

The indictment must show the ownership with the same particularity as in larceny. 15 *Cyc.* 517. *MacGregor's Case,* 2 Leach Crown Law 932, 938. *Rex* v. *Johnson,* 3 M. & S. 539, 548. *State* v. *Tracey,* 73 Md. 447, 448. *Bish. New Cr. Pro.* Sec. 320. *State* v. *King,* 95 Md. 125, 128. *State* v. *Blizzard,* 70 Md. 385, 386. See *Grin* v. *Shine,* 187 U. S. 181, 196, and *Moore* v. *U. S.,* 160 U. S. 268, 272. In *Com.* v. *Parker,* 165 Mass. 525, the court said (p. 539):

> "The offense of embezzlement has been often stated to be larceny committed by a certain class of persons, without a trespass; or, in other words, a statutory larceny"—larceny less trespass.

So material did the Government consider the element of ownership that this alone gave rise to eight counts in the indictment, differing only in this respect. Our demurrer was sustained (R. 5) as to four counts for failure to allege the ownership properly.

(*b*) The indictment (R. 1-2) alleges the ownership only by way of recital, and not directly; but it is elementary that this essential averment, like all others, "must be made directly, and not inferentially or by way of recital". *Pettibone* 1. U. S., 148 U. S. 197, 202. *U. S.* v. *Hess,* 124 U. S. 483, 486. 12 *Ency. Pl. & Pr.* 958. It is also necessary that the ownership be laid as of the date of the alleged offense. Unless the rule against a charge by way of recital was made merely to break, this allegation of ownership is fatally defective.

(B) The Proof.

The facts shown to prove the alleged ownership of the Association were merely that it owned certain real and personal estate in 1894; that it sold and conveyed this property absolutely and in fee on August 9, 1894, by deed and transfer of that date, to the Commercial Alliance Life Insurance Company, a New York corporation, for a consideration of $14,000 cash and the assumption of certain obligations; that creditors of the Association filed proceedings to declare the vendee a trustee of the property for them, on the ground that the sale was constructively fraudulent in equity as against them; that receivers were appointed in November, 1894, who sold the property in 1895; that in June, 1896, a final decree was passed setting aside the deed of the land to the Company, and awarding the net proceeds of the real estate to the Association creditors; that the creditors en-

titled to the said net proceeds were afterwards ascertained to be the four distributees named in the sixth count of the indictment, and the fund was finally decreed to be paid (and was paid) to them to the amount ($15974.07) named in the indictment, and the balance was awarded to the receivers to the amount of $10,070.82. The substance of the entire evidence of ownership as such is set out below, in the order—or rather disorder—in which it was offered by the Government.

The ruling of the appellate judge is that a vendor, whose sale is vacated merely in behalf of his creditors, as constructively fraudulent in equity as against them, thereby reacquires his ownership, or it remains in him (R. 80), as against his vendee and persons not creditors, though no reconveyance to the vendor is ever decreed or made.

The proof further showed that the Association was dissolved as a corporation on August 9, 1894, and never came to life again, and never thereafter reacquired any ownership of or interest in either the land or its proceeds, or the personalty or its proceeds.

(*a*) It is, of course, necessary that the proof shall sustain the allegation of the Association's ownership; otherwise the variance is fatal. *State* v. *Collins*, 4 N. D. 433, 434. *Ranguth* v. *People*, 186 Ill. 93, 97. *State* v. *DeWolf*, 29 Mont. 415, 420. *Livingston* v. *State*, 16 Tex. App. 652, 656. *Brady* v. *State*, 21 Tex. App. 659, 660. *Alden* v. *State*, 18 Fla. 187, 190. *Washington* v. *State*, 72 Ala. 272, 276. *Reeves* v. *State*, 95 Ala. 31, 41. *Underhill Cr. Ev.* Sec. 286. *People* v. *Van Ewan*, 111 Cal. 144, 147. 7 *Ency. P. & P.* 433, 454. 12 *Ency. P. & P.* 960. 15 *Cyc.* 526.

It is also necessary for the proof to sustain the allegation of the Association's corporate existence, or the variance is fatal. 12 *Ency. Pl. & Pr.* 971. *Alden* v. *State*, 18 Fla. 187, 190.

Both the trial and appellate judges fully concede that the averments of ownership and corporate existence at the time of the alleged offense, are essential both to be made and proved.

The material question is whether the evidence sustains these allegations of the indictment. They hold that it does. We contend that it not only does not sustain them, but affirmatively proves them to be absolutely untrue.

(*b*) The substance of the entire evidence (other than as to corporate existence) in the order in which it was offered to prove the

Association's alleged ownership after the code took affect, and within the statute of limitations, is as follows:

(1) Paper purporting to be an original bill in equity, No. 15907, filed in Supreme Court, D. C., on October 6, 1894, by the Association against the Commercial Alliance Life Ins. Co., a New York corporation, alleging that on August 9, 1894, in pursuance of a prior agreement between them, the Association sold and conveyed to the Company all of the former's property and effects, consisting of its life insurance business and the good will thereof, and all the personal, mixed and real estate then owned by the Association, the said real estate consisting of premises No. 419 Tenth St., N. W., Washington, D. C., and being more particularly described as the N. ½ of Lot 11 in Sq. 378; that the Association conveyed said real estate to the Company by deed duly recorded in the Land Records D. C., in Liber 1937, folio 161; that this sale and conveyance were procured by the Company's false representations as to its financial status; that the Company was to reinsure the Association's policy-holders, to hold the real estate in trust for and subject to prior claims of certain beneficiaries, and to keep and operate an office in this District; and the bill prays for a decree annulling this transfer, and the deed of the real estate, and that the same be reconveyed by the court to the Association (R. 30). (2) Paper purporting to be an order appointing Lipscomb and Fields as receivers of said property, on their qualifying by each giving bond, and requiring the Company and its agents and attorneys to deliver said property to said receivers (R. 31). (3) Paper purporting to be an order directing said receivers to sell said real and personal property, except the books, papers and documents (R. 32). (4) Paper purporting to be receivers' report that they had sold the real and personal property (R. 32). (5) Paper purporting to be an order *nisi* confirming said sale (R. 32). (6) Papers purporting to be orders finally confirming said sale (R. 32). (7) Paper purporting to be a decree of June 27, 1896, annulling said deed, and awarding the entire net proceeds of said sale of said real estate to the payment of the claims of the Association's policy-holders, some of whom had intervened in the cause (R. 33-34). (8) Paper purporting to be an auditor's report of July 31, 1900 (printed in 21 App. D. C. 344, 349), under said decree, finding that

said Association acquired said real estate in the course of its existence; that before or about August 9, 1894, it entered into an agreement with said Company to convey to the latter the personal property, business and good will thereof, and the real estate and all the effects, real, personal and mixed, of said Association; that said Association executed a deed on August 9, 1894, by which it granted and conveyed said real estate to said Company; that said Company paid $14,000 to said Association as the consideration for said deed; that on August 30, 1894, Ball and two others filed their bill in Eq. 15809 against said Association, Lawrence Gardner, and said Company, alleging said agreement and transfer, and that they were a fraud in equity on them and other like policy-holders of the Association; that the Association and Gardner answered this bill, admitting the conveyance of said real estate to said Company by said deed of August 9, 1894; that in the meantime the Association filed said bill in Eq. 15907; that subsequently petitions for leave to intervene were filed by various certificate-holders or creditors of the said complainant Association; that these intervenors distinctly recognized the validity of said transfer by said Association to said Company, and counted on the Company's undertaking to hold the property in trust for their claims under their policies; that said Company purchased the said property, and not the stock, of said Association; that with said $14,000 the Association redeemed and extinguished all of its outstanding stock; that the Association was dissolved prior to October 1, 1894, and "was not an existing corporation; that it was dissolved by the transfer of all of its property, assets and business, and by the fact that there was at that date neither stock of the Association nor stockholders;" that "it follows as a necessary consequence that the corporation was dead"; and said report then awards and distributes the entire proceeds of said sale of said real estate (as "said decree of June 27, 1896, does not include the personalty or its proceeds") to said policy-holders to the extent of $15,090.74 and to said receivers for costs, charges and commissions, to the extent of $9,324.39, to the total exclusion of said Association, which made no claim to any part of said proceeds at any time (R. 35-36). (9) Paper purporting to be an auditor's report of December 7, 1903, redistributing said entire pro-

ceeds to said receivers to the extent of $10,070.82, and to four only of said policy-holders to the extent of $15,876.57, said four being the persons named as owners in the sixth count of the indictment. The auditor made this report under the decision of the Court of Appeals of March 3, 1903 (21 App. D. C. 344), to which he refers, and which he quotes in part, including that part which holds that the other certificate-holders of said Association are entitled beyond question to the remainder of the fund after payment of the Stuart claim (R. 36-37). (10) That the proceeds of the sale of said personalty were paid by said receivers' check drawn to the order of the plaintiff in error, dated August 25, 1900, and payable to him as solicitor for Wm. T. Gilbert, receiver of said Company, for $210 (R. 39). (11) Copy of deed in fee from Bacon and Larner, Trustees, to said Association, dated September 16, 1889, and recorded in Liber 1421, folio 278, purporting to convey said real estate (R. 44). (12) Copy of deed in fee simple from said Association to said Company, dated August 9, 1894, and recorded August 10, 1894, in Liber 1937, folio 141, conveying to said Company the said real estate. With this deed, and as a part of it, there is a certificate by the secretary of said Association that at a special meeting of the stock-holders, after due notice, at the office of the Association, August 9, 1894, a resolution was adopted directing the president to convey in fee simple the title to the said real estate to the said Company for such consideration as he might deem advisable (R. 44-45). (13) Decree and order of distribution of May 5, 1904, confirming said auditor's report (R. 47-48) of December 7, 1903, and directing the distribution of the entire proceeds of said sale of said realty as set out in said report (R. 36). (14) Opinion of Judge Cox, on which said decree of June 27, 1896 (R. 33), was based (10 App. D. C. 316, 343), to the effect that said Association was dissolved on August 9, 1894, by its said sale and transfer on that date to said Company, and by the facts that the said Company bought the property and not the stock of said Association, and that with the said $14,000 purchase money received for its property said Association then redeemed and extinguished all of its outstanding stock; that its said deed of that date to said Company was in equity constructively fraudulent as against creditors of said Association, and for that reason

should be set aside as against them; that said creditors do not proceed on the ground that said deed was fraudulent under Stat. Eliz., and there is no averment that there was express fraud under that statute to cheat and defraud creditors; that there is no such averment in any one of those bills which are consolidated, but they all proceed on the ground of trust; that said deed should be set aside, and the proceeds applied to debts; that the said proceeds of said sale of said real estate belong exclusively to such creditors; that "the corporation [Association] had dissolved itself" on August 9, 1894, and had "vanished into thin air"; that the court has not found it necessary to pass upon the matters in controversy between the two associations, because, without reference to them, *the creditors are entitled to the whole fund as against both companies* (R. 52-53). (15) Opinion of Court of Appeals (10 App. D. C. 316), affirming said decree of June 27, 1896, and adopting said opinion of Judge Cox in full as part of its own opinion, and deciding that said Association's suit in Eq. 15907 against said Company virtually became a creditor's suit by the Association's creditors; that as such it would seem to have been treated by all the parties, and as such certainly it was regarded by the court below at the hearing; that the substantial question in the case is to whom does the fund belong; that if the transaction between the Association and Company was as claimed by the president of said Association, a court of equity could not lend itself to a performance so absurd as would be the restoration of property from the grasp of said Company, as a company, to the possession of the same Company as the sole stockholder and, therefore, entire owner and proprietor of the said Association and of all of its property and franchises; that if the claims of the creditors of said Association shall not exhaust the fund, in that event, *of course any residue undisposed of will go to said Company—not to said vendor Association* (R. 53). (16). Letter of the plaintiff in error of 1904 in which he referred to the same moneys mentioned in the indictment as the "W. B. E. A. money" (R. 53).

This is every line of evidence in the case (other than as to corporate existence) offered to prove the Association's alleged ownership; and at its close we moved the court to direct a verdict of not

guilty because of the failure to show the ownership as alleged, but the court overruled our motion, and we excepted (R. 59, Ex. 34). Then we asked the court to tell the jury to return such verdict on the third count on all the evidence in the case; but this was also denied, and we excepted (R. 59, Ex. 36, Prayer IV). Afterwards the court instructed the jury as follows (R. 61, Prayer XII):

"The jury are instructed, as matter of law, that the first paragraph of the decree of the 27th of June, A. D. 1896, *revested no title to the real estate* that was sold by the receivers, *or to the proceeds thereof, in the Washington Beneficial Endowment Association.*". Yet the court, in the face of this instruction and such conclusive evidence against the Association's ownership as alleged, told the jury (R. 67) that they must find from this evidence, beyond a reasonable doubt, that the Association owned the money.

(*c*) If the deed of August 9, 1894, was in fact procured by the Company's false representations, still the ownership passed absolutely in law and in fact from the Association to the Company. *Shappirio* v. *Goldberg*, 192 U. S. 232, 242; and if the deed was fraudulent as against the vendor Association's creditors, still the ownership so passed. *Luhrs* v. *Hancock*, 181 U. S. 567, 573. The Company took actual possession of the property, which it was ordered to deliver to the receivers (R. 31). The deed was valid *inter partes*, and was based on a valuable consideration—$14,000 paid in cash and certain obligations assumed. Under this deed the ownership vested in the Company, and its title to the land was not divested until the sale and conveyance by the receivers, when it vested in their vendee—*never again in the Association*.. The proceeds of sale merely became the substitute for the property sold, subject to the Company's same ownership, rights and liens. "The effect of the sale by consent was merely to substitute the fund in place of the real estate, and did not change the issues." *Bank* v. *Sheffey*, 140 U. S. 445, 451. "Assets derived from the sale of the * * * corporation * * * property became * * * the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale and while they remained in the possession of the corporation." *Ry. Co.* v. *Howard*, 7 Wall. 392, 410. The deed was set aside for constructive fraud in equity on the Association creditors, but not for fraud on them under the statutes of Elizabeth. *It was not set aside on behalf of the Association*, nor for

any fraud on it, nor even under its bill, but only on behalf of its creditors and under their pleadings. They distinctly recognized the validity of the deed but counted on the Company's undertaking to hold the property subject to their liens and in trust for their claims. No reconveyance to the Association, either of the property or the proceeds of the sale, was ever made or decreed. The property had been sold and conveyed away by the receivers nearly two years before the deed was set aside by the decree, so that the decree did not, and was not intended to, divest or reinvest or affect the ownership or title to the property itself; but the sole purpose and effect of the decree were to arrest the proceeds of sale in the receivers' hands for the primary benefit of the Association creditors, *but not to confer any ownership thereof on the Association,* nor to divest the general ownership thereof out of the Company, nor to vest it in the Association. The decree left the entire transaction between the Association and Company perfectly valid and binding as between themselves; but invalidated it only as to the Association creditors, and then only to the extent necessary to satisfy their claims, leaving the whole of any surplus to go to the Company and not to the Association, and the entire proceeds of sale so to go if the creditors of the Association were otherwise satisfied. If the decree reinvested the general ownership in the Association, the surplus, of course, would go to it and not to the Company; but the court decided that it should go to the Company. *Gilbert* v. *Wash. Ben. Endow. Association,* 10 App. D. C. 316, 343. *Gilbert* v. *Ben. Endow. Association,* 21 App. D. C. 344, 367. The Association was absolutely concluded as to any interest in or ownership of the property or proceeds, by the several orders and decrees passed in Eq. 15, 907, from none of which it ever appealed; and it never even so much as claimed any such interest or ownership before the auditor or elsewhere, and was absolutely excluded from the distribution. That the deed, though as to Association creditors constructively fraudulent in equity or fraudulent under the statutes of Elizabeth, was valid and binding between the vendor Association and the vendee Company, and passed the grantor's title and ownership to the grantee, and that the decree setting it aside in behalf of such creditors did not revest any title or ownership in the Association, are points conclusively settled by the case of *Luhrs* v. *Hancock,* 181 U. S. 567, in which the court said (pp. 573, 574):

"It has been held in some jurisdictions that a judgment against a debtor becomes a lien on land fraudulently conveyed by him. In other jurisdictions it has been held otherwise, and this court has held otherwise. *Miller* vs. *Sherry*, 2 Wall. 237, was a creditor's bill to set aside fraudulent conveyances, and a question arose as to the effect of the judgment upon land previously conveyed. The court said: 'The judgment obtained by Mills and Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law.'

"The rule and the reason for it are admirably expressed by *Judge Deady* in *In re Estes*, 3 Fed. Rep. 127, as follows:

" 'In my opinion, the lien of a judgment which is limited by law to the property of or belonging to the debtor at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by a deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is, nevertheless, valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void', but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser."

The Association never had any right to demand from the receivers the property or proceeds, even if it had satisfied its creditors; but, with the creditors paid, such right abided with the vendee Company, or its receiver Gilbert. It is elementary that a decree setting aside a deed for fraud on creditors vacates it only as to them and only to the extent necessary to satisfy their claims; it remains valid

between the parties and against the world, except creditors. Of course, the grantor cannot set up his own fraud to vacate his deed.

> "No rule of law is more firmly established than that a transfer of property made in fraud of creditors, while void as to them, is binding upon the parties and those in privity with them." 14 *Ency. Law* 273.

Void against creditors means ineffectual against legal process; for the creditor cannot lawfully seize the property conveyed, except by such process; nor can he get any title or lien by a subsequent conveyance from the grantor; and if the creditor take possession under any such subsequent conveyance, he is liable to the fraudulent grantee for conversion. *Id.* 311.

In the case at bar, as we have seen, the Association creditors distinctly recognized the validity of the Association's deed to the Company, and counted on the latter's undertaking to hold the property subject to their claims. When the property was sold by the receivers, the ownership of the proceeds of sale vested instanter in the Company, in which the ownership of the property sold was vested by the Association's deed of August 9, 1894.

By the appointment of receivers in Eq. 15,907 the court simply laid its hands on the property, for ultimate purposes; but it destroyed no ownership or rights, having merely arrested the property to abide future judicial action on conflicting claims. We are not concerned with the question of ownership except as to the Association; for so long as it appears by the evidence that *the Association was not the owner* as alleged in the indictment (R. 1-2), *it is wholly immaterial who was.*

The court instructed the jury that it was necessary for them to find from the evidence beyond a reasonable doubt that the moneys "belonged to and were the property of the Washington Beneficial Endowment Association at the time of the alleged commission of the offense; [and] that said company had, at the time of the alleged conversion, a corporate existence" (R. 60, Prayer X). This was repeated in other prayers. The court also instructed the jury, as we have seen, that the first paragraph of the decree (R. 33) of June 27, 1896, *revested no title to the real estate or its proceeds in the Association.* The proof showed that the Association's ownership passed to the Company by the transfer and deed of August 9, 1894, and there was no room to deny this; and so the first paragraph of the

decree was offered to prove that by it the Association reacquired its ownership. On its face, it is futile for any such purpose; but the court told the jury so in terms (R. 61, Prayer XII).

The instructions given by the trial court will be regarded as the law of the case in testing the sufficiency of the evidence to support the verdict. 2 *Cyc.* 725. The appellate court, as a matter of law, will reverse a judgment based on a verdict unsupported by any legal, competent evidence; and the question of the insufficiency of the evidence to support a verdict is properly raised and presented as one of law. 3 *Cyc.* 351.

(*d*) As to the ownership, Judge Cox, after considering the sale and conveyance by the Association to the Commercial Alliance Company of August 9, 1894, and the effect of the Association paying the received consideration of $14,000 to its stockholders in extinguishment of all its outstanding stock said: "I have not found it necessary to pass upon the matters in controversp between the two associations, because, without reference to them, the creditors are entitled to the whole fund as against both companies." Opinion of Judge Cox in *Gilbert* v. *Endowment Asso.*, 10 App. D. C. 316, 365.

The Court of Appeals, in 1897, in *Gilbert* v. *Endowment Association*, 10 App. D. C. 316, affirmed Judge Cox's opinion and decree in full, and adopted (p. 343) his opinion as part of its own. The court specifically held that the deed could not have been set aside on the bill of the Association, but that it was properly vacated on the pleadings of the intervening creditors. On this point the court said (p. 338):

> "But if the fact be, as claimed by the president of the Association in his testimony and elsewhere in the record, that the Commercial Alliance Company had become the owner of all the stock of the Endowment Association, a court of equity could not lend itself to a performance so absurd as would be the restoration of property from the grasp of the Commercial Alliance Company, as a company, to the possession of the same Commercial Alliance Company as the sole stockholder, and therefore the entire owner and proprietor of the Endowment Association and of all its property and franchises. * * * The suit, therefore, has virtually become a suit by creditors and certificate holders to reach the assets of an insolvent corporation for the satisfaction of their claims. As such, it would seem to have been treat-

> ed by all the parties; and as such certainly it was regarded by the court below at the hearing. * * * The substantial question in this case is—to whom does the fund in court equitably and justly belong? The pleadings and the testimony fairly present that question."

The court then considers this question and decides as Judge Cox did,—that it belongs exclusively to the creditors, regardless of the matters in controversy between the Association and the Commercial Alliance Company.

The court expressly held that the deed was not set aside in behalf of the Association, but that, as between it and the Commercial Alliance Company, it remained perfectly valid, so that any residue, after satisfaction of creditors, would go to the Commercial Alliance Company and not the Association. Of course, if the effect of the decree of June 27, 1896, was to revest any title or ownership in the Association, such residue would go to it, and not to the Commercial Alliance Company. This same result would necessarily follow if the deed of August 9, 1894, from the Association to the Commercial Alliance Company did not pass the former's title to the latter. On this point the court said (p. 343):

> "In the event that it shall be found that the claims of the creditors and certificate holders did not exhaust the fund in the hands of the receivers or the assets of the Association * * * of course any residue undisposed of would go to the Commercial Alliance Company, and it would be of no consequence whether it would so go because that Company had become the sole owner of the stock of the Association, or because on general principles of equity it should so go."

In *Gilbert* v. *Endowment Association*, 21 App. D. C. 324, the court, in March, 1903, considered the auditor's report (printed in 21 App. D. C. 349) of July 31, 1900 (R. 35-36), and found that the only error in it was that the auditor had not allowed the Stuart claim in full; and for this reason alone the decree of the court below which confirmed this report was reversed, and the cause remanded for readjudication in this respect. The opinion in 10 App. D. C. 316 was expressly affirmed *in toto*.

Regarding the ownership of the balance of the fund, and the cor-

porate existence of the Beneficial Endowment Association, the court said (p. 367):

> "That they [the other certificate holders] are entitled to a distribution among them of the remainder of the assets of the Association, after the payment of the Stuart claim, we regard as beyond question. It has been held that the Commercial Alliance Company is not entitled to participate in any distribution until the certificate holders are satisfied. • • • There is nothing for the Endowment Association, for it is hopelessly insolvent, and has gone out of existence."

If those decisions were right, then this judgment must be wrong; but they were dismissed by the trial court with the comment that "it makes no difference what another court has decided in another case." This case was tried on four counts, and the evidence was received under all; but while it went to the jury on only one count none of the evidence totally inadmissible under that count was eliminated; and hence the bill of exceptions states the substance of all the evidence under all the counts; and with it all combined, the Association's alleged ownership is not only unproved but shown to be unprovable under any conceivable circumstances.

Could the Association have recovered the land or the proceeds of sale by civil action, on such evidence of its ownership as we have here? Clearly not; yet a mere preponderance of proof is sufficient in such an action.

Let us repeat that the evidence offered by the Government in this case proved affirmatively and beyond any question both that the money did not belong to the Association at any time after January 1, 1902, and that the Association did not have any corporate existence after that date,—in fact, that both such ownership and corporate existence ceased absolutely on August 9, 1894; yet this verdict and judgment find the very contrary.

The opinions in 10 App. D. C. 316 and 21 App. D. C. 344, including those of Judge Cox and Auditor Payne, show that they were based upon an exhaustive investigation of the law and facts relating to the Association's alleged ownership and corporate existence; and we think they must be accepted as final; especially so, as against the superficial rulings in this case, and the evidence offered.

"There was no question that such was the fact, and it was error to submit the matter to the jury to find some other fact not supported by any evidence. * * * This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury. * * * The court should have, therefore, directed a verdict of not guilty on those counts." *Burton* vs. *U. S.*, 196 U. S. 283, 298, 301.

The trial court should have granted our motion (R.59, Ex. 34) and prayers (R. 59, Ex. 35, Prayer 1; R. 59, Ex. 36, Prayer IV) for a verdict of not guilty on this third count, for failure to prove the ownership as alleged, if for no other reason.

The evidence proved that the Association's ownership ceased absolutely on August 9, 1894; that it then passed to the Company; then to Gilbert, its receiver; and then, under the annulment decree of June 27, 1896, in part to the four creditors named as the owners in the sixth count of the indictment, who were judicially and finally declared entitled to all that was not awarded to the receivers, and who ultimately received it as the owners.

(*c*) The sum stated in the indictment is a mere paper balance of the gross fund of $24,415.13 plus $1,532.26 (R. 36), less the $10,070.82 decreed to the receivers (R. 36)). There was no actual segregation of the money. Beyond any question, the proceeds ($210) of the sale of the personalty, which were not affected by the annulment decree, belonged to and were properly paid to Gilbert (R. 39); and from the time the receivers were awarded the $10,070.82 for commissions, costs and charges, they became part owners of the gross fund jointly with the four creditors to whom the balance was decreed. It therefore follows that the plaintiff in error was a joint owner of this fund from a date prior to the code; and even if the Association were the other owner, he is not liable under section 841, for it requires the money to be, and it is elementary law that it must be, wholly and exclusively the property or estate of another than the accused. *McElroy* v. *People*, 202 Ill. 473, 474. *State* v. *Kent*, 22 Minn. 41, 42. *State* v. *Riddick*, 2 S. Dak. 124, 125. 10 *Am. & Eng. Ency. Law* 985, 986. 15 *Cyc.* 492, 493. Many other authorities to this point are referred to in those cited.

The ownership of the four distributees, when they were ascertained (R. 36-37, 48) related back to the annulment decree of June

27, 1896 (R. 33), by which the net proceeds of the real estate were awarded to the creditors of the Association.

(*f*) The appellate judge says (R. 80) that "the conveyance of the property having been annulled, the legal ownership of the same and its proceeds *remained* in the Endowment Association until a distribution thereof among its creditors or beneficiaries could be determined and carried into effect. That the fund may have been finally ordered to be distributed, after the alleged date of its appropriation by the receivers to their own use, or that it may hereafter be, upon final settlement of the litigation, can have no effect upon that ownership, which was then in the Endowment Association *for all the purposes of this case.*"

This simply ignores the inexorable effect of the evidence, overrules the prior decisions, and replaces them with an arbitrary declaration of the Association's ownership "for all the purposes of *this* case." Neither the Government nor the accused was a creditor of the Association, and its deed was not void nor vacated as to either of them, but only as to the Association's creditors. It was valid as to all other parties, and for all the purposes of this case.

Surely, the legal ownership of both the property and its proceeds did not remain in the Association. It could not own both. In law and in fact it had neither, after August 9, 1894. When the four distributees were ascertained, their ownership related back to the annulment decree, as we have said, and wherever the ownership of the net proceeds was at that date, it then passed to them, and did not remain where it was until the distribution was carried into effect.

The very statement by the appellate judge of his reasons for holding the Association the owner "for all the purposes of this case", shows their utter weakness and fallacy. The holding is simply arbitrary, for the failure of the evidence to prove the ownership as alleged was too patent to be rationally explained away. The trial judge did not even attempt to do so; but up to the time he gave his general charge to the jury, he said that the whole subject of the pleading and proof of the ownership was utterly immaterial in this case, and that it made no difference whatever who was the owner.

The date of the final order of distribution of the money was May 5, 1904 (R. 48), and "the alleged date of its appropriation" was Nov. 23, 1903 (R. 1-2); but the date of the Association's conveyance to

the Company was August 9, 1894 (R. 30, 35, 44, 45), and that of the annulment decree was June 27, 1896 (R. 33).

No case can be found to support the proposition that the decree vacating the deed only in behalf of creditors operated a reconveyance to the vendor Association, or caused the ownership to remain in it "for all the purposes of this case"; and this decree is neither of itself a conveyance nor does it direct one. Judge Cox said in terms that there was no actual fraud in that deed, but only constructive fraud in equity. The creditors admitted the validity of the deed, but asked that the vendee be decreed a trustee of the property for their benefit (R. 35), and this was the sole purpose and effect of the decree, notwithstanding it was worded in the form of annulment. How could any residue go to the vendee Company, if the ownership either remained in or returned to the vendor Association, as was directly declared as to such residue in 10 App. D. C. 316 and 21 App. D. C. 344? The creditors did not at all proceed under the statutes of Elizabeth; but even if so, the ownership passed and any residue would go to the vendee, notwithstanding a decree vacating the deed for creditors, even as utterly void. The trial court ruled (R. 61, Pr. XII) that the decree did not operate a reconveyance of the land or its proceeds. It was not contended in the trial court that the deed was inoperative to pass title, but only that the decree revested it in the vendor, which contention that court expressly denied. We find nothing in the evidence or the law, or the previous decisions of the courts below, to the effect that the ownership remained in or reverted to the Association "for all the purposes of this case", which arose nine years afterwards, and requires proof of the general, legal ownership of the money in the Association. The equity suits have been finally settled and closed, and the money has been paid to the distributees, as ordered by that court.

Of course, the order (R. 31) appointing receivers in no manner affected the ownership. In *Union Bank* v. *Bank of Kansas*, 136 U. S. 223, this court said (p. 236):

> "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property into his custody as an officer of the court for the benefit of the party ultimately proved to

be entitled, but not to change the title, or even the right of possession, in the property."

In *Great Western Co. v. Harris*, 198 U. S. 561, the court said (p. 576):

> "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned."

It is as novel as it is senseless to hold that a vendor, whose deed is vacated in behalf of his creditors for constructive fraud in equity as against them, to whom the entire net proceeds of the property are awarded to satisfy their claims, thereby re-acquires his ownership, or it remains in him; but this is the holding of the appellate judge "for all the purposes of this case."

It is quite certain that if this conviction had been based upon some other count of the indictment, the Association would not have been held to be either the owner or a body corporate, but the owner named in such other count would have been promptly held to be such "for all the purposes of this case".

(2) Association Was Not a Body Corporate.

(A) The Pleading.

The allegation of the indictment (R. 2) that the Association was "a body corporate", was essential. The rule is that if the alleged owner be a corporation, the indictment must so aver. *Wallace* v. *People*, 63 Ill. 451, 452. *People* v. *Bogart*, 36 Cal. 245, 248. *Edmonds* v. *State*, 87 Ala. 12, 13. *Thurmond* v. *State*, 30 Tex. App. 539, 540. *White* v. *State*, 24 Tex. App. 231, 233.

Another rule is that the ownership must be laid in an existing person, otherwise it cannot be sustained; for a dead person cannot own property. If the death appear from the indictment, demurrer or motion in arrest will lie; and if it appears by the proof, the variance is fatal. 12 *Ency. Pl. & Pr.* 971.

(B) THE PROOF.

The appellate judge admits (R. 80) that under the allegations of the indictment it was necessary to prove that the Association, the alleged owner of the fund, was a body corporate. He also concedes (R. 80) that there were "some irregularities" in the proof of the articles of incorporation, but refrains from its discussion, as it would require some space. Though confessing that said proof was inadmissible, and though it is elementary that the admitting of incompetent evidence over objection is cause for reversal, he says nothing as to the effect of the trial court's erroneous actions in this respect. Except for the incompetent evidence of *de jure* incorporation, and the remarkable charge (R. 67-68) of the trial judge on this subject, no jury could have found from the other proof that the Association was a *de facto* corporation after August 9, 1894. "It is elementary that the admission of illegal evidence over objection necessitates reversal." *Waldron* v. *Waldron*, 156 U. S. 361, 380. Who can say that this illegal evidence and the charge concerning it were not prejudicial to the accused?

The trial court instructed the jury (R. 60, Prayer X) to acquit unless they found from the evidence beyond a reasonable doubt that the Association "had, at the time of the alleged conversion, a corporate existence". This was repeated in other prayers (R. 60, Prayer VII A; R. 61, Prayer XI); but by the charge (R. 67-68) the court destroyed these prayers by telling the jury in effect that the Association had such corporate existence.

We contend that there is no legal evidence in this case to show that the Association ever was a corporation either *de jure* or *de facto;* but if we err in this, then we insist that the evidence shows that it was dissolved on August 9, 1894, and has never since been "a body corporate", nor "had, at the time of the alleged conversion, a corporate existence." The Government first attempted to prove that the Association was an existing *de facto* corporation on November 23, 1903, the date alleged in the indictment; but this was abortive, as it did not reach after the year 1894. The prosecution then abandoned this attempt, and tried to show that it was an existing *de jure* corporation on said date, but with no better success.

(a) The *de facto* proof was: *Dr. Young* (R. 37): "I know nothing of the organization as a corporation."

Eckloff (R. 41): Knew that there was such an Association here at one time; does not know that it existed in November, 1902; knows that it did business at one time; knew Gardner, its president; never had a policy, but paid other persons' premiums to Gardner for them; it first did business on F Street, and he believes it moved to 419 10th Street, N. W.; it was in 1879 or 1880 when he was there and knew it was doing business, and when he met Gardner, whom he has not met since; does not know when it ceased business, but understood it had ceased; does not know Gardner is dead. *Dr. Donaldson* (R. 44): The Association was incorporated in 1873; he was ont of the incorporators, and was president of it for about twelve years; there was a secretary and treasurer; it first met in Gardner's studio, and then on Tenth street where the building was that it occupied until its *dissolution;* it carried on life insurance business; he ceased to be president about three or four years before its *dissolution*; it was closed up and went out of business about 1893; it has not carried on any business since 1893 to his knowledge. *Edson* (R. 54): Was connected with the Association as a stockholder and policy-holder at the time it failed, which was in 1894; it was then doing business on Tenth street near the gas office; it ceased to do business in 1894; since 1894 it has not carried on any business here or elsewhere.

That this proof is wholly insufficient to show that the Association was a *de facto* corporation at any time, is clearly shown by *Baptist Church* v. *Ry. Co.*, 4 Mackey 43, 47, under the same general incorporation act, in which the court notes (p. 47) the "manifest difference between a special act of incorporation and a general act of incorporation such as we have in force here", and states the essentials of proof of *de facto* existence under each.

If the testimony proved a *de facto* corporation, it did not prove its existence after 1894; but the charge of the indictment is that it was "a body corporate" on November 23, 1903—eleven years later. Proof that a company has a president, secretary or treasurer, does not raise a presumption of its incorporation, because voluntary associations may, and constantly do, act through such officers. The proof was wholly insufficient in law to show a *de facto* corporation existing on November 23, 1903. 10 *Cyc.* 253, 256.

In *Baptist Church* v. *Ry. Co.*, 4 Mackey 43, *supra*, speaking of the proof of a *de facto* corporation under a special act, the late Judge Cox said (p. 47):

> "It would not be sufficient to show a charter to certain persons which required certain acts to be performed in order to amount to an organization under the charter, without going farther. Nor would it be sufficient to show that any body of men had simply called themselves a corporation and assumed to act as such, without showing a charter."

Directly in point as to the proof under the same general incorporation act in the case at bar, he further said (p. 47):

> "Where there is a general incorporation act, it would be equally insufficient for any body of men to show that they had simply been acting as a corporation, without going farther and showing some authority to do so. Nor would it be sufficient in addition to show or to offer in evidence, or invite attention simply to the fact that a general act of incorporation was in force in the jurisdiction. It would be necessary farther to show that that general act of incorporation had become a special charter of these individuals in some way or other in order to make out a case of incorporation *de facto*. In order to do that, it is necessary to show some steps taken towards an organization under the general incorporation act."

(*b*) The *de jure* evidence was: *Pinchback* (R. 41): Is employed in office of recorder of deeds; produces a book from said office called Acts of Incorporation No. 2; folio 165 thereof purports to be a record of a certificate of incorporation of the Association; this record was offered in evidence (R. 42), ***but was ruled out***; a certified copy of said record was then offered (R. 42), ***but was also ruled out***; he had searched for the original certificate in the files where it ought to be kept, but could not find it; a series of books was in said office, called Acts of Incorporation; he has been in said office since November, 1891, off and on. *Schayer* (R. 42): Was in recorder of deeds office for thirty years; a series of libers was kept there, called Acts of Incorporation, under act of Congress; the custom was to record all certi-

ficates, whether required by law to be recorded *or not*, and then to return them to the persons who brought there the record receipts; a ruling of the office required them to be recorded; he knows the handwriting of the copyist who made said liber copy of said certificate; said copyist is dead; it was the duty of the assistant clerk to make this copy in said liber and compare it with the original. *Recital of Bill* in Eq. 15907 (R. 30): Association is a corporation, and was duly incorporated under the laws of the District of Columbia on April 2, 1877, for the purpose of carrying on the business of life insurance; and that a copy of the certificate of incorporation is attached to and made a part of its bill, as is also a copy of the certificate of endowment issued by the said complainant to the insured. *Statement of United States Attorney* (R. 42): The original certificate of Association's incorporation was lost, diligent search had been made for it, but it could not be found (*he had it in his own possession at the time*, R. 21-23). He then offered the said liber copy "as secondary evidence of the original" (R. 42), saying (R. 43): "Remember, we are not offering the record as a record that is required to be kept by law." The court admitted it over our objection (R. 43, Ex. 16) that no proper foundation for secondary evidence had been laid, that the loss of the original had not been proved, that the execution of the original had not been proved, and that said copy does not prove the execution of the original. Said copy appears in full in the record (R. 43-44), and purports to be attested by a witness S. C. Mills.

Pinchback's testimony proves nothing; Schayer's was incompetent, and proves less; the United States Attorney's statement was erroneous (R. 23, 26), and was taken as proof though unsworn; the recitals of the bill in equity were not evidence against us of the facts or conclusions recited; the liber copy was not admissible as secondary evidence on any such showing. At the close of all the Government's evidence we moved the court (R. 43, Ex. 28) to strike out all of this secondary evidence, but our motion was denied.

The record was not primary evidence, for no law authorized the certificate to be recorded in said office. *R. S. D. C.* Sec. 553, *U. S. Ry. Co.* v. *Reed*, 80 Fed. 234, 236 (C. C. A.). 17 *Cyc.* 315, 316, 334. *Fifth Bap. Ch.* v. *Ry. Co.*, 4 Mackey 43, 48. *Wigmore Ev.*, Sec. 1649. *Lloyd* v. *Simons*, 90 Minn. 237, 243.

No foundation for secondary evidence was laid. The copy was not shown to be a true copy; the existence of the original was not proved; its execution was not shown; its loss was not proved; not a word of evidence was given to show search for it in any proper place; the attesting witness was not called nor accounted for; his handwriting was not proved; the United States Attorney's statement that the original had been lost and that diligent search had been made for it and that it could not be found was erroneous, for at that very time he had the original in his own possession, and had so had it for about two months (R. 22-23). Every rule relating to secondary evidence was broken. "A party will not be allowed to give secondary evidence of the contents of original papers in his possession". 17 *Cyc.* 567. Proof of the due executilon, existence and genuineness of the original instrument is an essential prerequisite to secondary evidence of the contents thereof. 17 *Cyc.* 536. Attested instrument must be proved by the subscribing witness, if available, or by proof of his handwriting, and other evidence, if not. 17 *Cyc.* 431. If the original had been produced here, the Government would have been bound to prove its execution and genuineness. Its mere production would not prove it. In *Clark* v. *Courtney*, 5 Pet. 344, 345, the court said:

> "In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. * * *
>
> "The rule was not complied with in the case at bar. The original instrument was not produced at the trial, nor the subscribing witnesses; and their non-production was not accounted for. * * * It is said that the conduct of the parties amounted to a waiver of the due proof of the original. We are of opinion that the production of the original was under the circumstances dispensed with by the parties, and that a copy of it was impliedly assented to as a substitute for the original. But we do not think that the implication goes farther, and dispenses with the ordinary proof of the due execution of the original, in the same manner as if the original were present."

Of course, there must always be full proof of the loss of the original, before secondary evidence can be received. The subject is fully discussed in 17 *Cyc.* 465-567.

When we called the trial judge's attention to the fact, on our motion for new trial (R. 23), that the U. S. Attorney had the original in his possession when he made the statement as to its loss, the diligent search for it, and the inability to find it (R. 42), and contended that the secondary evidence should not have been admitted, he replied that "the error in admitting the secondary evidence was cured by the fact that at the time the United States Attorney had the original in his possession." For this action of the prosecutor, our motion for new trial (R. 20-24) is, in this respect, reviewable on appeal, being an exception to the general rule that such a motion cannot be reviewed. *Kelly* v. *Moore,* 22 App. D. C. 9, 29, and cases therein cited.

The proper proof of a *de jure* corporation is stated in Judge Thompson's article on corporations in 10 *Cyc.* 219, 235, as well as in his Commentaries. We do not think that the evidence in this case, all of which is fully recited in the bill of exceptions, proved that the Association was either a *de facto* or *de jure* corporation in existence on November 23, 1903, or any other date.

(*c*) Conceding, however, that it was duly incorporated as recited in the bill in Eq. 15907, then the evidence shows that it was legally dissolved on August 9, 1894. It clearly appears that on August 9, 1894, the Association, by the unanimous consent of all of its stockholders, sold and conveyed away absolutely all of its assets and business; that it then voluntarily, totally and intentionally ceased its business, and abandoned its franchise, and the object or purpose for which it was incorporated; that with the purchase money it then redeemed and extinguished every share of its stock outstanding; that it was hopelessly insolvent; that it has never since carried on business here or elsewhere, nor used its franchise; that it intended to dissolve; that it has never since had any stockholders or officers; that it lost its capacity to sustain itself by a new election of officers, as that power was gone, and it could not act until the deficiency was supplied; that by these acts *in pais* it voluntarily surrendered its franchise; and that it lost all of its members. What more is needed to effect a dissolution both *de jure* and *de facto*? Nothing, by the settled law.

Yet the trial judge charged the jury (R. 68) that "judicial proceedings" were necessary to the dissolution of this corporation.

We have only to examine the general incorporation act, *R. S. D. C.* Secs. 553-593, to see how completely the corporation dissolved itself. Judicial proceedings were not required. The statute made the stockholders the constituent element of the corporation; without them there could be no trustees, who must themselves be stockholders, and be elected by the stockholders, and manage the stock, property and concerns of the company; nor could there be a president, who must be designated from the trustees; nor any power to mortgage or give any lien on the corporation property—in short, no power whatever to carry out the object or purpose for which the corporation was organized. The very life of the corporation depended on the existence of stockholders; and when there ceased to be any stockholders, the corporation itself necessarily ceased, too, beyond the power of resuscitation. "The test by which to determine whether a corporation is dissolved for all purposes has been said to be to consider whether it has lost its capacity to sustain itself by a new election of officers .* * * If, however, the power is gone, and it cannot act until the deficiency is supplied, *the corporation is dissolved.* This is not a forfeiture for non-user, but is a consequence of law. 10 *Cyc.* 1270. A corporation may be dissolved in at least five ways (the charge (R. 68) says only one): (1) By expiration of charter term, (2) by act of the legislature, (3) by surrender of its franchise (voluntary dissolution), (4) by loss of all its members or an integral part thereof, and (5) by judicial proceeding. 10 *Cyc.* 1270. A private corporation may dissolve itself without the consent of the sovereignty, by surrender of its franchise and voluntary dissolution. 5 *Thomp. Corp.* Secs. 6680-6688. "An abandonment or surrender by the corporation of its franchise is a question both of fact and intent, and undoubtedly such an abandonment may be proved by acts as well as by words." *Id.* Sec. 6659.

> "A surrender may be made by acts *in pais* as well as by a formal proceeding for that purpose; and it may be concluded, upon abundant authority, that a surrender by a corporation of its charter may be presumed from a neglect, for a long period of time, to choose directors and to exercise the corporate franchises." *Id.* Sec. 6683.

Where a corporation disposed of all of its property, held no meetings for some years, elected no officers, performed no acts, and ceased to have any visible existence, it was held absolutely dissolved without any judicial proceedings for that purpose. *Strickland* v. *Prichard*, 37 Vt. 324, 327. It is well settled (contrary to the charge in our case) that whenever a corporation voluntarily and totally abandons the exercise of its franchises, and does or suffers to be done acts which destroy the end and objects for which it was incorporated, this *ipso facto* works a dissolution both *de jure* and *de facto*, because it must be regarded as equivalent to a direct surrender of its franchises; and in such case "an action in the nature of *quo warranto*, prosecuted by the State, does not, except in form, oust the corporation of its franchises; for it has already abandoned or surrendered them. It does no more than judicially ascertain the fact of the abandonment, and put it beyond all future question." 10 *Cyc.* 1281. Any circumstance or collection of circumstances which creates an incapacity to revive or resuscitate the powers of a corporation, operates in law *ipso facto* a dissolution of it. 10 *Cyc.* 1293. The sale and conveyance by a corporation of all its property works a *de facto* dissolution; but add to this the complete abandonment of its business and franchise, the extinguishment of all its stock, the loss of all its stockholders, members, trustees and other officers, and there is a complete dissolution of a private joint-stock company (as was the Association), both *de facto* and *de jure*.. 10 *Cyc.* 1296. One of the recognized modes by which a private corporation may be dissolved is a voluntary surrender of its franchises, either expressly or by acts which are equivalent. 10 *Cyc.* 1297..

> "It must be obvious that an acceptance by the State of the surrender of corporate franchises is not necessary in the case of corporations created for strictly private purposes and which have not assumed the performance of any public duties, but which do not differ, except in form of organization, from unincorporated joint-stock companies or business partnerships, in the continuation of which the State has no interest; but such a corporation may dissolve itself by the voluntary action of its members without the consent of the State. * * * The law affords no means by which the State can compel a private corporation to remain in existence. * * * A corporation may be dis-

solved by a voluntary surrender of its franchises, evidenced by its mere abandonment and non-user of them, without any formal tender of them to the State or acceptance of them by the State. * * * It is clear upon principle and authority that a corporation may become defunct for all purposes by its own voluntary act, or rather by the voluntary act or neglect of its members, and that it does become defunct for all purposes whenever there has been an abandonment of its franchises, committed under such circumstances, or continued for such a length of time, as renders it morally or legally impossible for it to resume them. * * * A surrender may be made by acts or neglects *in pais* as well as by a formal proceeding for that purpose; and it may be concluded, upon abundant authority, that a surrender by a corporation of its charter may be presumed from a neglect for a long period of time to choose directors and to exercise the corporate franchises." 10 *Cyc.* 1300, 1301.

"Whether a corporation has lost its existence is a fact *in pais*, which may be ascertained in any judicial proceeding, whether the question arises directly or collaterally, whenever its ascertainment becomes necessary for the protection of rights or the redress of wrongs." 10 *Cyc.* 1274.

This is very different from a collateral attack on the legality or regularity of the proceedings by which the corporation was created; for it concedes the creation, but asserts the death of the corporation.

Thus it appears that in every criminal and civil case corporate existence must be averred and proved—beyond a reasonable doubt in criminal cases, and by a preponderance of proof in civil—either *de facto* or *de jure*; and if the evidence shows facts or acts constituting a dissolution in any one of the five (not one) ways recognized by law, the variance is fatal. In case of acts *in pais* creating a dissolution as equivalent to a voluntary surrender, no judical proceedings are necessary to give effect to such voluntary dissolution. To say that a private joint-stock corporation can only be dissolved by judicial proceedings (Charge R. 68) is to ignore four-fifths of the law of corporate dissolution. While corporate creation is not generally open to collateral attack, yet it is always as competent to show corporate dissolution as the death of a natural person; and

this, too, collaterally, as well as directly. Proof of a *de jure* corporation is destroyed by proof of *de jure* dissolution; and proof of a *de facto* corporation is destroyed by proof of a *de facto* or *de jure* dissolution. In this case, the Government's own evidence showed an absolute and complete *de jure* dissolution—corporate death of the Association.

To the five methods of corporate dissolution above stated may be added a sixth, viz: Where by express provision of the charter itself, the omission to perform some act is made to work a forfeiture. *Bywaters* v. *P. & G. N. Ry. Co.*, 73 Tex. 624, 627.

(*d*) The decisions in 10 App. D. C. 316, and 21 App. D. C. 344, held directly and in terms that the Association was dissolved and went out of existence on August 9, 1894. The trial court said that "it makes no difference what another court has decided in another case." The question should be *stare decisis*.

As to the Association's corporate existence Judge Cox, after considering the sale and conveyance by the Association to the Commercial Alliance Company, of August 9, 1894, and the effect of the Association's paying the received consideration of $14,000 to its stockholders in extinguishment of all its outstanding stock, said (R. 52-53).

> "The payment of $14,000 to the stockholders was either a redemption and extinguishment of their stock, or it was a purchase by the Commercial Alliance. I think it must be regarded as the former. * * * Looking at it in that view, then, what was the effect of paying $14,000 to the stockholders? It was a simple extinguishment of the stock. From the moment that money was received they ceased to be stockholders. We know that the old rule of the common law was that the corporation expired upon the death of all its members; and so, also, if the members cease to be members, the corporation must cease, too. There cannot be a stock corporation without stockholders. This was a stock corporation and the trustees had to be elected from the stockholders, and the president elected from the trustees, so that the result of this transaction was that there were no stockholders, trustees or president. * * * *The corporation had dissolved itself. It had vanished into thin air.* The promises of the Commercial Alliance were made to a *mere phantom* and could not be enforced." Opinion of Mr. Justice Cox in *Gil-*

bert vs *Endow. Asso.*, 10 App. D. C. 316, 343, 357, 358, adopted in full by Court of Appeals as part of its own opinion.

On the same subject the auditor said (R. 35-36):

> "I am of the opinion that at the entry of the judgment [of Stuart against the Association on October 1, 1894,] the Beneficial Endowment Association *was not an existing corporation;* that *it was dissolved* by the transfer of all of its property, assets and business, and by the fact that there was at that date neither stock of the Association nor stockholders. * * * I am of the opinion that the stockholders parted with the ownership of the stock on the 9th of August [1894], and, as the Association could not hold it, the inevitable result was its immediate extinguishment. It follows as a necessary consequence that *the corporation was dead.* It could not exercise any corporate function. It could not sue or be sued. No process of any kind could be served upon it. All suits against it abated and with them the suit of Mrs. Stuart. I am reminded that in these consolidated cases the Association has been recognized by the courts as cap pable of suing and being sued. The want of such capacity by the civil death of the corporation was not made manifest to the court until the cases were submitted for adjudication. The condition was only developed in the proof then presented. Then the court had, in the combination of suits, sufficient proper parties, complete pleadings and satisfactory proof to sustain its jurisdiction and decree." Report of Auditor Payne of July 31, 1900, reported in 21 App. D. C., 353, 354, 355. (R. 35-36).

In *Gilbert* v. *Endowment Asso.*, 21 App. D. C. 344, the court considered the auditor's report of July 31, 1900 (R. 35-36, printed in part in 21 App. D. C. 353-355), and held that its only error was in not allowing Stuart's claim priority, and for this error alone the decree confirming it was reversed and the cause remanded for re-audit, in accordance with the opinion of the Court of Appeals. The court said (p. 367):

> "There is nothing for the Endowment Association,

for it is hopelessly insolvent, *and has gone out of existence.*

CIVIL COURTS.

Cox, J. (1896): "The corporation had dissolved itself." Court of Appeals (1897): "The corporation had dissolved itself." Auditor (1900, confirmed by Supreme Court D. C. and Court of Appeals in this respect, 21 App. D. C. 344): "The Beneficial Endowment Association was not [Oct. 1, 1894] and existing corporation. * * * It was dissolved. * * * The corporation was dead." Court of Appeals (March 3, 1903): "The Endowment Association * * * has gone out of existence." (R. 53, 52, 35, 36).

CRIMINAL COURT.

Wright, J. (1905): "If * * * the corporation ever was in existence * * * than it is utterly immaterial whether that corporation was continuing to * * * exercise the function of a corporation so long as it never was formally dissolved by judicial proceedings, concerning which there is no proof." (R. 68).

The evidence in this case showed something more than a mere discontinuance of business, or exercise of corporate function by the Association. The trial court stated but one item (R. 68) of the proof, and then gave judgment that form controls substance—a corporate suicide is not dead until it is judicially pronounced so.

The question of corporate existence or dissolution is one of fact for the jury, under proper instructions from the court. 10 *Cyc.* 1274, 1301, 1357, 1360.

On the evidence in this case, where was the corporation or officer or member who could institute or apply for the judicial proceedings? How could it act? Who could act for it? What interest had the sovereignty in this corporation? By the trial court's rule, perpetual death inexorably gives perpetual life; because it is so dead that it cannot ask a court to say so, therefore it is not dead. A court may as well assume to stay the natural death of a man as that of a private corporation. On the principle of this case, if the ownership had been laid in John Doe, and the evidence had proved that he had parted with his ownership eleven years before, and later

on the same day had died, the verdict and judgment would have been just the same as we now find them, unless it had been shown that John had been formally pronounced dead. Death is not fact, but form, said the trial court.

We have tried to show that "a body corporate" in the indictment is essential to be alleged and proved as laid, and that it has not been proved. The variance is necessarily fatal. Because there was no legal evidence to show the Association's corporate existence as alleged, it was the duty of the court to direct a verdict of acquittal on this third count, as we asked (R. 59, Prayer IV, Ex. 36; R. 59, Prayer I, Ex. 35; R. 59, Motion, Ex. 34).

Book No. 1, Acts of Incorporation, received in evidence over our objection (R. 42, Ex. 15) contained no entry or reference to the Association's incorporation, or to any other issue in this case, and was, therefore, wholly irrelevant; and it was error to overrule our objection to it.

Our prayer XVII (R. 62, Ex. 40) presents the law when any rebuttable presumption conflicts with that of innocence. It was asked with special reference to the presumptions of continuance of ownership and corporate existence, which, in this case, came into conflict with that of innocence. The court refused it, thus leaving the former presumptions in full force to weaken or destroy the effect of the latter. It is well settled law that the presumption of innocence is the highest rebuttable presumption known in criminal procedure, and that it is stronger than, and overcomes, every other rebuttable presumption which comes into conflict with it. It attends the accused throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. *Kirby* v. *U. S.*, 174 U. S. 47, 55. Every other rebuttable presumption must yield to it. *Davis* v. *U. S.*, 160 U. S. 469, 484 (it overcomes the presumption of sanity in a murder case, the proof being equally balanced). *Com.* v. *Whittaker*, 131 Mass. 224, 225 (seduction). *West* v. *State*, 1 Wis. 209, 215 (seduction). *People* v. *O'Brien*, 130 Cal. 1, 7 (rape). *Green* v. *State*, 21 Fla. 403, 405 (bigamy). *McArthur* v. *State*, 59 Ark. 431, 439, (libel). *People* v. *Roderigas*, 49 Cal. 9, 10 (seduction). *Zabriskie* v. *State*, 43 N. J. L. 640, 642 (seduction). *Powell* v. *Knox*, 16 Ala. 364, 369 (ownership).

Our prayer contains an accurate statement of the law, and should have been granted. The charge (R. 68) told the jury in effect that

the presumption of the continuance of the Association's corporate existence was conclusive, and that of its ownership almost conclusive, thus destroying or weakening the effect of the presumption of innocence with respect to these two essential facts.

(*c*) The appellate judge brushes the foregoing matters aside with the statement (R. 81) that there was "ample evidence" to show that the Association was a *de facto* corporation. He also says that the Association was *de facto* organized and acting as such, and he cites *U. S.* v. *Amedy,* 11 Wheat. 392, 409, to the point that proof of *de jure* or *de facto* incorporation could be made. He also says that the Association's discontinuance of its business, its ceasing to maintain its active organization, or its insolvency, did not cause it to cease to exist, to which he cites *Brown* v. *Cement Co.,* 1 App. D. C. 232, 236. He concedes that it ceased to do business in 1894. He remarks that it was sued and described as a coporation in the equity suit in which the accused was appointed a receiver; and he concludes (R. 81) that "it was and still is a corporation for all the purposes of the equity suit and of this case."

The doctrine of *U. S.* v. *Amedy* is conceded, if the proof shows a *de facto* existence at the very time of the alleged offense, but not, as here, if it merely shows such existence eleven years before, with nothing to show its continued existence, but express decisions to the contrary. Nor is the doctrine of *Brown* v. *Cement Co.* questioned; but here the showing went far beyond mere cessation of business and active organization and insolvency, as appears by 10 Ap. D. C. 316, and 1 App. D. C. 344, and this record. That some person sued in the corporate name, or sued it by such name, does not make or continue it as a corporation, for its dissolution was developed only by the proof. "The condition [of dissolution] was only developed in the proof. * * * Then the court had in the combination of suits sufficient proper parties, complete pleadings, and satisfactory proof to sustain its jurisdiction and decree" (R. 36). This was the approved answer to the very argument now made "that in these consolidated cases the Association has been recognized by the courts as capable of suing and being sued" (R. 36). We cannot see how "it was and still is a corporation for all the purposes of the equity suit and of this case;" nor can we find any such reservation, express or implied, in the former decisions.

If he had been given a chance, is there any doubt that the accused

could have reproduced in this case the same evidence of corporate dissolution that was given and held conclusive in the equity suits?

As if its repudiation of its own former decisions that the Association was dissolved on August 9, 1894, were not sufficient, the court below adds the astounding statement (R. 81) "that the defendant, who held the money by appointment as receiver in the equity suit which recognized the corporation as one *de facto*, at least, and under a decree declaring its ownership of that money for the purposes of the suit, is in no attitude to deny its *de facto* status."

The equity court *did not*, after the proof, recognize the Association as a corporation either *de jure* or *de facto*, but held (R. 53) directly the contrary—*"The corporation had dissolved itself. It had vanished into thin air."*

Again (R. 36-37):

> "The Beneficial Endowment Association was not an existing corporation; * * * it was dissolved * * *. The corporation was dead. It could not exercise any corporate function. It could not sue or be sued. No process of any kind could be served upon it. All suits against it abated."

The Court of Appeals, as we have shown, expressly approved and adopted as its own the language quoted, and said itself that *"the Endowment Association * * * has gone out of existence."*

The decree (R. 33) *did not* declare "its ownership of that money for the purposes of the suit," but both Judge Cox and the Court of Appeals held that the Association's ownership ceased absolutely on August 8, 1894. The decree did declare the ownership of the creditors and receivers, and the fund was finally paid in part to the four creditors named (R. 36) in the sixth count of the indictment, and the balance was awarded absolutely to the receivers themselves (R. 36).

By what earthly reason can the accused be estopped in this case to deny the Association's alleged corporate existence? If estopped why does the court below say (R. 80) that "it was necessary to prove that it * * * was a body corporate"? If estopped as to corporate existence, why not as to ownership and receivership and possession as receiver and fraudulent conversion? Is the mere presentation of the indictment conclusive proof of guilt of the crime alleged, and every element thereof? Can a chancery receiver be estopped to

deny the very fact which the court in the receivership case directly decided, and which decision the appellate court itself affirmed? Both the chancery court and the Court of Appeals held in terms, as we have shown, that the Association was dissolved as a body corporate on August 9, 1904; and we are utterly at loss to conceive any reason why the accused is estopped to deny its corporate existence eleven years later.

We have already noted that a receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. *Union Bank* v. *Bank of Kansas*, 136 U. S. 223, 236. He is not the agent of any of the parties. By what rational principle can he be estopped, as the court below says he is estopped in this case? The court states none.

It is noticeable that the court below is silent as to what it said in its former decisions concerning the Association's non-ownership and corporate dissolution. Why?

In the trial court, the prosecution entirely abandoned its effort to prove a *de facto* existence of the Association as a body corporate at any time after the code took effect on January 1, 1902, or within the three year period of limitation, but it relied exclusively upon its alleged proof of *de jure* existence. The trial judge nevertheless sent both aspects to the jury, with a practically peremptory charge of corporate existence under each aspect. The appellate judge rejects the *de jure* proof as irregular, and accepts the *de facto* as ample evidence of the Association's corporate existence on November 23, 1903, the date laid in the indictment. The situation is unique, to say the least.

X. THE CONVERSION.

(1) The Pleading.

The indictment (R. 2) charges that the accused came into possession of $15,974.07, and that on Nov. 23, 1903, they "did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the same." This is the entire charge of conversion. Is it sufficient?

Suppose this bare charge were set out in a bill in equity for the removal of trustees; would it withstand a demurrer for want of particulars of the fraud and conversion? Suppose it were made in a declaration at law for the recovery of money; would it be good?

Undoubtedly, the modern tendency of trial courts is to strip indictments more and more of the averments tending to inform the accused of the nature and cause of the accusation against him; and many a man has gone to a prison cell on an indictment that would not stand for an instant as a good pleading in a court of law or equity. The nature of the accusation is stated, but the cause is omitted, and the indictment is held sufficient. It is of but little aid to the accused to be informed that he is charged with having fraudulently converted to his own use a certain sum of money on a certain day, without more. What information does this give him of the cause of the accusation, or of the acts or facts which he must be prepared to meet on his trial? That it gives none, but is actually misleading and serves as a trap for the accused, can be seen by examining this indictment (R. 1-2) and then turning to the evidence (R. 38-41) offered and received to prove the alleged conversion

As said before concerning a bill of particulars, there is no statute here dispensing with the particulars of the alleged embezzlement, but there are such statutes in some of the States. Embezzlement is a single act offense. It does not depend upon or consist of a series of acts or a course of conduct. Every act of embezzlement is complete in and of itself, and is separate and distinct from all others, however numerous or analagous in point of time or otherwise they may be. Convenient as it may be to the prosecution to dump *en masse* into the indictment and proof, every act of the accused from the beginning to the end of his fiduciary relation, without any specification, discrimination or election, yet the Constitution forbids, or if not, the rules of law do, and it requires a statute to change them.

Our demurrer (R. 3) points out that the indictment is bad in substance because "no facts or particulars are alleged to show that the defendants have converted or appropriated the alleged money to their own use, either fraudulently or unlawfully or otherwise; but only a mere conclusion is alleged." Our demurrer was overruled (R. 5), and our motion for a bill of particulars (R. 7) was denied.

(*a*) To embezzle is to convert to one's own use fraudulently and feloniously, and *vice versa*. This indictment therefore simply

charges that the accused "embezzled the same", this being stated by way of conclusion from the preceding conclusion of fraudulent conversion, its synonym. The offense is merely averred by name instead of facts, and this form of pleading is clearly bad for generality. It consists only of conclusion, and conclusion upon conclusion.

The charge amounts simply to an averment that the accused embezzled by embezzling, that they fraudulently converted to their own use by fraudulently converting to their own use. This is the effect of a charge that the accused embezzled, that is, committed embezzlement, by fraudulently converting the property to his own use, or a charge that he fraudulently converted it to his own use and thereby embezzled the same; for the terms are synonymous, interchangeable, and convertible, and combined they do not extend the scope of the information given to the accused, beyond that given by either.

In *Com.* v. *Smart*, 6 Gray 15, the indictment alleged that certain property of one Scott (describing it) was intrusted to the defendant to deliver to the said Scott on demand; that afterwards it was demanded of him by the said Scott, and the defendant refused to deliver it, but "embezzled and fraudulently converted it to his own use." This was held fatally defective on motion in arrest. The court said (p. 17):

> "The general charge of embezzlement and felonious appropriation to his own use by a party, of property entrusted to him, is insufficient to constitute a legal and effectual accusation."

In *McCann* v. *U. S.*, 2 Wyo. 257, the charge was that the defendant "feloniously and fraudulently did embezzle" certain sugar of the United States. This was held fatally defective on demurrer, and the court said (p. 286):

> "The count charges the defendant with embezzlement, without alleging its constituent facts; it charges therefore a mere legal conclusion, leaving it impossible to determine whether the offense was committed, and the conclusion correct."

This case was approved in *Moore* v. *U. S.*, 160 U. S. 268, in which the court said (p. 274): "Whether an indictment charging in such general terms that the prisoner 'embezzled' the property of the Gov-

ernment (identifying it), would be sufficient, we do not undertake to determine." Speaking of a charge that the accused "did embezzle the sum of $1,652.59, money of the United States,' the court said (p. 276) that this "generality of description would be clearly bad."

In 7 *Ency. Pl. & Pr.* 439, it is said:

> "Where the indictment sets forth that the property was delivered to the defendant in trust, or for a particular purpose, it is not sufficient to allege merely that the defendant did embezzle, or that he did convert, but the acts of the defendant that were inconsistent with the trust confided to him should be specially set forth."

In *People* v. *Gale*, 77 Cal. 120, 121, the indictment alleged that the defendant as administrator of Polly received $1794, but accounted in his final settlement only for $1700, and so did then and there "fraudulently appropriate to his own use and purpose" $94 of Polly's estate; and it was held (p. 121) that it "does not, in the absence of all averments of other necessary inculpatory facts, constitute the crime of embezzlement."

In 10 *Am. & Eng. Ency. Law* 983, 984, it is said that it must be alleged by way of facts and particulars, not conclusions, that the defendant's dealing with the property constituted a criminally fraudulent conversion of it to his own use.

In *State* v. *Brandt*, 41 Iowa 593, the embezzlement statute (p. 606) applied if any officer "unlawfully convert to his own use in any way whatever." The indictment (p. 596) charged the defendant with unlawfully and feloniously converting the sum of $5000 to his own use, "without stating how or in what manner the money was converted" (p. 611), and it was held fatally defective. The court reviewed numerous cases and said (p. 612):

> "To charge that defendant converted to his own use public money, is charging a legal conclusion rather than a fact. The manner in which the money was converted should be alleged, so that the court may determine whether in legal contemplation there has been an unlawful conversion of the public money or not. To charge that one committed 'murder', or 'robbery', or larceny', would be bad. The facts constituting the crime must be stated. So to charge 'unlawful conver-

sion' of the public moneys is bad, because it is not a statement of the facts composing the offense intended to be charged."

In *State* v. *Griffith*, 45 Kan. 142, the indictment (p. 142) charged that the defendant as bailee "did then and there unlawfully and feloniously embezzle and convert to his own use", certain property, and it was held (p. 145) fatally defective for want of the particulars of the bailment and the conversion. The court cited various cases and said (p. 144):

> "It has generally been held under similar statutes that the indictment, or information, should not merely state the bailment or trust, but should aver the facts and circumstances which made the case embezzlement; and it is also necessary to state the purpose for which the defendant was entrusted with the property."

In *State* v. *Longworth*, 41 Tex. 162, the indictment charged that the defendant as bailee was entrusted with a certain gun to take from one place to another, and that he (p. 163) "did then and there convert to his own use and benefit the said gun," etc. This averment was held (p. 163) to be a mere conclusion, and not to allege any embezzlement. The court said (p. 163) that the indictment "is manifestly uncertain, indefinite, and ambiguous in its averments, and does not charge appellee with any offense in plain and intelligible words."

In *People* v. *Poggie*, 8 Cal. 42, the indictment (p. 43) charged that the defendant as bailee "did feloniously and willfully convert the same to his own use, with the intent to steal the same," and it was held (p. 44) fatally defective. The court said (p. 43):

> "It may then be safely assumed that all conversions of money, or property, by a bailee, are not *ipso facto* unlawful or felonious under our statute. * * * If such is the case, then the character of the bailment, and the mode of conversion, should be distinctly set forth in the indictment."

In *Com.* v. *Fahnestock*, 4 Pa. Dist. Rep. 297, it was charged that the defendant as a broker (p. 298) unlawfully, with intent to defraud, "did convert and appropriate the said $500. to his own use." The statute (p. 298) applied "if any person * * shall * * *

with intent to defraud * * * or in any manner convert to or for his own use, or to the use of any other person", etc. This was held (p. 298) fatally defective without the facts of the alleged conversion.

In *Com.* v. *Hottenstein,* 8 Woodward's Dec. 477, the first count (p. 478) charged that the defendant, as a bank cashier, "then and there unlawfully, fraudulently and willfully did embezzle" certain money. The second count (p. 478) charged that he did "take away and appropriate to his own use and benefit" certain other money. Both counts were quashed (p. 480) "in that their terms are too vague to meet adequately any of the provisions of the" statutes.

In *Territory* v. *Heacock,* 4 N. Mex. 354, the statute (p. 356) applied to any person who "shall embezzle or fraudulently convert to his own use", etc. The indictment (p. 355) charged that the defendant "unlawfully, knowingly, willfully, and fraudulently did embezzle and convert to his own use" certain money. This was held (p. 357) fatally defective, for want of the facts constituting the conversion. The court states the facts of and quotes approvingly from *Com.* v. *Smart,* 6 Gray 15, 16, *supra,* as follows (p. 357):

> "It is among the first and most familiar of the rules of criminal pleading that, in an accusation against a party charged with the commission of an offense, all the facts and circumstances of which it is constituted ought to be specifically stated and set forth. Tried by that rule, the indictment against the defendant is manifestly defective and insufficient. * * * It contains no description of the act complained of."

We have stated *supra* the allegations of the indictment in *Smart's* case. The court then says (p. 357):

> "What was he to do with it, and what did he do that was unlawful? It may be answered, he appropriated the property to his own use unlawfully. If so, the facts which constitute the unlawful appropriation should in any event be averred. The same case [*Smart's*] says [p. 17]: 'The general charge of embezzlement and felonious appropriation to his own use, by a party, of property intrusted to him, is insufficient to constitute a legal and effectual accusation.' These authorities * * * seem conclusive on the point made by the demurrer, and [it] * * * should have been sustained."

In the case at bar, the indictment merely alleges that the defendants as receivers came into possession of $15974.07, and fraudulently converted the same to their own use, and thereby embezzled the same. Not a single inculpatory fact or particular is charged, but only this conclusion of the pleader from non-averred facts or suppositions. The charge is far less complete than that held had in *People* v. *Gale, supra.*. It is a mere statement of the offense in the words of the statute, without any averment of the accompanying facts and circumstances essential to constitute a specific offense. Such a statement must be accompanied with an allegation of such facts and particulars as will inform the accused of the specific offense coming under the general description of the crime with which he is charged, and enable him to prepare for his defense; and also that he may plead his conviction or acquittal in bar of further proceedings. The words of section 841 merely point out the means which give rise to the ultimate act, leaving it to the indictment not merely to repeat its words but to set out the primary and individualizing facts and particulars which constitute the specific offense, as well as each constituent element thereof. What did the accused do to warrant the conclusion that he fraudulently converted the money to his own use, and thereby embezzled it? How did he do it? Is he entitled to be informed of these facts?

> "Embezzlement is a criminal breach of trust; but every breach of trust is not embezzlement. The statutes were not intended to cover every breach of trust, nor every fraudulent breach of trust, and render it a criminal offense. Embezzlement always presents a case of a breach of trust, but every breach of trust is by no means embezzlement." 10 *Ency. Law* 990.
>
> "An investment or deposit of trust funds should always bear the impress of the trust, and it is almost universally considered that a fiduciary commits a breach of trust, for which he is liable, where he invests or deposits the funds intrusted to him in his own individual name or to his individual credit, with nothing to show that he holds such investment or deposit in a fiduciary capacity." 17 *Ency. Law* 456. This rule applies even though he acts with perfect good faith and integrity. The liability is generally predicated of the naked fact that there has been a technically unauthorized dealing with the trust fund. *Id. ibid.*

> "Where a fiduciary invests or deposits trust money in his individual name he commits a breach of trust which is practically the same, and subjects him to the same liability, as if there had been a wilful conversion to his own use, or a commingling of the trust funds with his own private funds." 17 *Ency. Law* 457; and see *id.* pp. 459-460.

These quotations show how intensely vital it is that the indictment shall state the very acts, facts and particulars of the alleged fraud and conversion; for the fiduciaries' acts may be technically fraudulent conversions, but at the same time absolutely non-criminal under the statute. Let us have the facts, so that we may know whether we are to meet a civil or a criminal charge.

(*b*) Under section 841, the general words "fraudulently convert or appropriate to his own use", would include a case where one, in legal contemplation, converted money or other property to his own use, but in perfect good faith and honesty in fact, and without the slightest intent to defraud in fact, but also under circumstances which the law declares to be technically fraudulent. The statute does not apply to such a fraudulent conversion, for the criminal intent to defraud in fact is lacking. What constitutes fraud or converting or appropriating to one's own use or embezzlement is a question of law to be determined from the specific facts or acts which are claimed to constitute each or all. Sec. 841 covers only criminal fraud in fact, as contra-distinguished from technical fraud in law. There are so many things that a fiduciary may do innocently but which may technically be a fraudulent conversion or appropriation to his own use, or which at least may be claimed to be such by others, that it is essential that the very acts, facts and particulars shall be distinctly set out in an indictment against him for embezzlement, and especially those on which is based the conclusion of fraudulent conversion and embezzlement, so that the court may see that the pleader's conclusion is correct, or quash the indictment if it is incorrect, and so that the accused may know just what he must meet. The constitutional provision that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him, demands something more than a mere general charge; nature and cause are not here synonymous, but the former means the general character of the charge—for example, larceny, forgery, mur-

der, libel, embezzlement—while the latter means the particulars, the precise facts and acts on which the charge is based; or, otherwise stated, *both a charge and a specification are required.* Even court-martial proceedings demand this much. This indictment gives the general charge, but omits the specification.

The words of section 841, by their generality, may embrace cases which fall within the terms but not within the spirit or meaning thereof. Clearly it would include in its terms a case of technically fraudulent conversion by a fiduciary, where the act was done in perfect good faith, such as an investment made or a bank account opened in his individual name, either inadvertently or by the fault of others. Therefore the specific facts must be alleged to bring the defendant precisely within the inhibition of the law. 10 *Ency. P. & P.* 487. *Com.* v. *Barrett,* 109 Mass. 302, 303. *U. S.* v. *Johnson,* 26 App. D. C. 136, 139.

An act may be fraudulent in law but innocent in fact. The law requires a criminally fraudulent intent in fact. "Unlawfully" suggests nothing fraudulent or criminal. "Fraudulently" suggests both fraud in fact and fraud in law. All criminal acts are fraudulent, *but all fraudulent acts are not criminal.* Hence, the indictment must directly charge fraud in fact, and thus exclude mere fraud in law. Sec. 841 is not directed against unlawful conversion, but only against conversion criminally fraudulent in fact. To charge that one fraudulently converted does not necessarily mean that he converted with an actual, felonious intent to defraud in fact; for the charge may refer to a conversion in legal contemplation and technically fraudulent. Fraudulent conversion is one thing; but conversion with felonious intent to defraud is quite another and different. Proof that one converted to his own use by an act technically fraudulent is not sufficient to support a charge of embezzlement; but actual, felonious, criminal fraud in fact is essential both to be alleged and proved under all indictments for this offense.

The criminal intent is the all-controlling element and distinguishing feature of criminal law; it is the very life and spirit of penal procedure; without it, the act is not criminal.

The bare allegation that one fraudulently converted to his own use merely charges, by way of conclusion, that he converted by an act fraudulent in law, but not *vi ex termini* in fact. It states no fraud, at all; and it does not charge embezzlement.

In *U. S.* v. *Watkins,* 3 Cranch C. C. 441, decided by the Circuit Court of the District of Columbia in 1829, the defendant was indicted for devising and intending fraudulently to obtain for his private use moneys of the United States by certain false pretenses particularly stated. There were three indictments found against him, and objections were taken to the sufficiency of their allegations of fraud. In considering the objections, the court said (p. 477):

> "Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is, therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. *Starkey,* in his late treatise on criminal pleading, in p. 163, says: 'Whether particular circumstances constitute an indictable fraud is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out in order to show that the facts amount to an indictable offense.'"

In *Evans* v. *U. S.,* 153 U. S. 584, 594, the court said that "it is entirely true that an allegation of fraud is insufficient, either in an indictment or a bill in equity, without giving the particulars of the fraud." *U. S.* v. *Atherton,* 102 U. S. 372, 374, is to the same effect. "In pleading fraud either at law or in equity, it is a well settled rule that the facts must be stated in the declaration or petition, not conclusions." 20 *Cyc.* 96. In 16 *Cyc.* 231, the rule is laid down as follows:

> "A bill seeking relief on the ground of fraud must distinctly and specifically charge the fraud. *It must state the specific facts and circumstances constituting the fraud,* and the facts stated must be sufficient in

themselves to show that the conduct complained of was fraudulent. General charges of fraud, or that acts were fraudulently committed, are of no avail, unaccompanied by statements of specific facts amounting to fraud."

In a bill in equity is a charge that the defendant fraudulently converted the trust fund to his own use, sufficient without more? If not, why should it be sufficient in an indictment for an infamous crime? Trial courts in large cities have gotten so deeply into the rut of sustaining all indictments, and presuming the guilt of all defendants, and proceeding to convict them as a matter of course, that it is difficult to get them to give pause sufficient to note that any particular case is not within their rigid rule of conviction at any cost. The accused is informed merely of the nature of the charge—that he is charged with larceny or libel—but that is all sufficient for their purpose of conviction. It has been truly said:

"How use doth breed a habit in a man."

(c) The general essentials of indictments are well settled, and but little more than their mere statement is required to show that the indictment in this case is fatally defective in more respects than one.

The Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature *and cause* of the accusation against him." It is this provision that requires absolute certainty in all indictments under the laws of the United States. "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted such omission can not be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital." *Pettibone* vs. *U. S.*, 148 U. S. 197, 202. "The indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction the record may show with accuracy the exact offense to which the plea relates." *Evans* vs. *U. S.*, 153

U. S. 584, 587. "It is certainly a fundamental principle in the common law that every party accused of crime is entitled to have every essential fact that enters into the definition of the offense set forth in an indictment, with such full and entire accuracy, that the offense may judicially appear to the court in pronouncing judgment thereon, whether upon demurrer or after conviction. * * * The indictment must be certain to every intent, and without any intendment to the contrary; and the crime must be charged with such certainty and precision that it may be understood by every one, so that the party may know how to defend against such charge. Hence, facts and not mere conclusions from facts, or conclusions of law, must be stated." *Ainsworth* vs. *U. S.*, 1 App. D. C. 518, 523. "The general, and with few exceptions, * * * the universal rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital. * * * The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict." *U. S.* vs. *Hess*, 124 U. S. 483, 486, 488. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." *U. S.* vs. *Cruikshank*, 92 U. S. 542, 558. The indictment "must charge all the facts and circumstances which constitute the offense, and not mere conclusions of the pleader, as no intendment can aid a charge where the facts and circumstances alleged do not bring the accused within the

prohibition of the law." 10 *Ency. P. & P.* 475. "Each count of an indictment is considered to all intents and purposes a separate indictment." 10 *Ency. P. & P.* 540. It is not sufficient to charge one with an offense by its technical name; but the acts which make up the offense must be stated with particularity, certainty and precision. *State* vs. *Murray*, 41 Iowa, 580, 581. "Every offense consists of certain acts done or committed under certain circumstances, and, in an indictment for the offense, it is not sufficient to charge the defendant generally with having committed it." *Archb. Cr. P. & P.* 86. Everything not expressly alalleged, or necessarily implied, is presumed against the indictment and pleader. 10 *Ency. P. & P.* 475.

Each of the cases cited shows the application of the principles stated, as does each of the following:

In an indictment for embezzlement, an allegation that the defendant sold certain lumber and converted the proceeds to his own use, is not equivalent to an averment that the proceeds of sale came into his hands. *Grant* vs. *State*, 35 Fla. 581, 585. In an indictment under section 5440 R. S. U. S., it was charged that defendant conspired to defraud the United States of the title to certain land. A necessary element of the particular offense was that the land contained minerals. The indictment charged that the defendant knew that the land contained valuable mineral deposits; but in *U. S.* vs. *Penschel*, 116 Fed. Rep. 642, 648, such an indictment was held bad because of the omission of the direct averment that the land did in fact contain minerals. A charge in an indictment that a defendant had in his possession counterfeit money, which is described; that he passed it to another person, who is named, with intent to defraud that person; states facts from which a strong inference arises that the defendant knew that the money was counterfeit; but in *U. S.* vs. *Carll*, 105 U. S. 611, 613, such an indictment was held bad because of the omission of the direct averment of knowledge. In *McCann* vs. *U. S.*, 2 Wyo. 267, *supra*, the defendant was indicted under the Act Cong. March 3, 1875, 18 Stat. 479, which enacts "that any person who shall embezzle, steal or purloin any money, property * * * of the property of the United States, shall be deemed

guilty of felony." The indictment (p. 269) alleged that McCann "at and within the district aforesaid, twenty thousand pounds of sugar * * * of the goods, chattels and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal and purloin." This was held defective (p. 286) as charging a mere legal conclusion, leaving it impossible to determine whether the offense was committed, and the conclusion correct. It was said (p. 286) that the indictment for this offense must set forth the actual fiduciary relation and its breach; that (p. 287) the indictment did not identify the offense on the record; and did not (p. 287) secure the accused in his right to plead a former acquittal or conviction to a second prosecution for the offense. It was held (p. 288) that the words "to embezzle" were equivalent to the words "to commit embezzlement," and that (p. 289) *a count in the words of the statute was not sufficient;* that (p. 290) all the ingredients of fact that are elemental to the definition must be alleged, so as to bring the defendant precisely and clearly within the statute.

Quoting from *U. S.* v. *Hess,* 124 U. S. 483, 486, the court said in *Keck* v. *U. S.,* 172 U. S. 434, 437:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury."

In *U. S.* v. *Potter,* 56 Fed. 83 (C. C. D. Mass. 1892), on demurrer to an indictment for a violation of the national bank law, the court said (p. 89) that it is not sufficient for the pleader merely to state the facts from which an offense can be implied, or only so many of the essential elements as in the ordinary experiences of life, "or even in a statute, might suggest all the other elements; but he must state in terms everything necessary to state a criminal act." It would be sufficient if a statute set out in terms that larceny on shipboard on the high seas should be punishable; but an indictment that merely alleged that the accused committed larceny on board of a certain ship, naming it, on the high seas, *"embracing the entire phraseology*

of the statute, but without details of the property stolen and of its ownership, and the other usual details, *would be wholly insufficient*" (p. 89). There are certain offenses that are punishable independently of intent, especially under the revenue laws; but (p. 89) "generally there can be no crime unless there is a criminal purpose. Congress, however, in declaring offenses, does not always note this distinction in the terms of the statute. It sometimes prohibits the act and declares the penalty in quite the same terms, whether as a part of the revenue laws, where the intent is not always important, or as part of the general criminal code, where it is essential; but in the latter case, the courts understand that the guilty purpose is an element which must be set out in the indictment, although not necessarily in the statute." *U. S.* v. *Carll,* 105 U. S. 611, 613. Sometimes a statute (p. 89) "is so general in its terms that the indictment must allege many particulars which the statute omits." *U. S.* v. *Cruikshank,* 92 U. S. 542, 558. "While it is ordinarily enough that the indictment declares an offense in the language of the statute, * * * this is not universally true, and does not excuse the prosecutor from setting out every essential element constituting the crime" (p. 89). The court then proceeds as follows (pp. 89-90):

> "In order to properly inform the accused of the 'nature *and cause* of the accusation', within the meaning of the Constitution and of the rules of the common law, a little thought will make it plain * * * that not only must all the elements of the offense be stated in the indictment, but that they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, *but the particular act or acts* touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description

> of the alleged offense. These rules are well expressed in *U. S.* v. *Cruikshank*, 92 U. S. 542, 557."

(*d*) The court below says (R. 76-77) that it was not "necessary to allege the particular manner in which the defendant unlawfully and fraudulently converted the money and appropriated the same to his own use. These words have a well known signification, common as well as legal, and are of common use in indictments for larceny and embezzlement". To this point the court cites two authorities, *Moore* v. *U. S.*, 160 U. S. 268, 271, and *Grin* v. *Shine*, 187 U. S. 186, 189, and the opinion in *Gassenheimer* v. *U. S.*, 34 W. L. R. 80, 82 (26 App. D. C. 432, 438).

These words *have not* any legal signification. They are never used in indictments for larceny. Neither of the authorities cited supports the statement, but each merely holds that the word "embezzle" has a settled technical meaning of its own, like the words "steal, take, and carry away," used in larceny. The opinion in the *Gassenheimer* case, which involved an indictment for receiving embezzled property, is unsupported by any authority or reason, in so far as it tends to sustain the proposition that an indictment for embezzlement under section 841 need not state the facts and particulars of the alleged fraud and conversion. Even though the pleading use the word "embezzle," of settled technical meaning, it is bad without the specific acts; and this must be still more true of the use of the unsettled and variable phrase, "fraudulently convert to his own use." *Batchelor* v. *U. S.*, 156 U. S. 426, 429. *U. S.* v. *Britton*, 107 U. S. 655, 661, 669. *U. S.* v. *Simmons*, 96 U. S. 360, 362

In *State* v. *Palmer* 32 La. Ann. 565, the court said (text, 571):

> "In all prosecutions for the violation of the laws of the State, the utmost certainty and distinctness of pleading, the strict construction of the provisions of penal statutes, according to the usual and reasonable meaning of words and terms, and the admission or rejection of testimony according to the rules of pleading and law of evidence, are required."

Without pursuing the subject farther, we submit that this indictment is bad for want of the particulars of the alleged fraudulent conversion.

(2) The Proof.

The indictment (R. 2) charges in but one count only a single act or offense of embezzlement, namely, the fraudulent conversion of a specific sum of money (*sic*) on a certain day. At the outset, we are met by the fact, recited (R. 40) in the bill of exceptions, that "the Government offered no evidence tending to show any conversion at one time and in one lump sum of the $15,974.07 mentioned in the indictment, nor of any conversion on November 23, 1903, the date of the offense alleged therein." *We shall look in vain to ascertain of what the accused has been convicted.*

The proof (R. 38-41) consists of an unelected, unconnected and indiscriminate mass of facts and figures, comprising not less than 92 separate and distinct items, acts or transactions, each of "which the Government claims in itself was an embezzlement"—(R. 69) an independent, substantive offense—43 of which proceded the code and the statute of limitations; the 92 items covering a period beginning on March 17, 1897, and ending after November 23, 1903—six and a half years, five of which preceded the code. The evidence comprises four distinct bank accounts, three of which preceded the code; 61 checks against these accounts, 17 of which preceded the code; 16 time certificates of deposit, 14 of which preceded the code; and 15 withdrawals, from such certificates, 12 of which preceded the code.

The court charged the jury (R. 69-70) that they "would be justified" in finding the accused guilty of the whole 92 items if he "conceived a plan to embezzle this fund systematically," though 43 of these items preceded the code, 61 of them involved checks which were not money alone mentioned in the indictment, 16 involved time certificates of deposit which were not money, *and there was not a scintilla of evidence of any such plan or embezzlement.*

Each and all of these items were offered and received in evidence as proof of distinct, substantive acts of embezzlement of money by the accused; and the court said (R. 69):

> "Inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, [each of] which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in dealing with those various items."

The balance of the charge (R. 69-70) on this point leaves the jury at liberty (1) to convict of the entire 92 items, or (2) in any event to consider them. Whether the accused has been convicted of one, or more, or all, or none of the 92 items; or of one, or more, or all, or none of the other offenses with which the prosecutors falsely charged him in their arguments (R. 63-65) to the jury, it is impossible to say.

(*a*) A most serious question is presented as to the sufficiency of the evidence offered, to show that the accused at any time fraudulently converted to his own use the whole or any part of the receivership fund; and this requires an examination of all of the proof on this subject, the substance of which is as follows:

> On June 28, 1895, the defendants received for the land sold two checks payable to them as receivers and aggregating $21233.10 (R. 37); they endorsed these checks (R. 38), and with them opened an account as receivers in the West End National Bank on July 5, 1895 (R. 38); on March 17, 1897, by three checks payable to the Washington Loan and Trust Co., they checked out their balance (as shown by the ledger entries) in the purchase of two time certificates of deposit from said Trust Co., dated March 17, 1897 (R. 38); they renewed these certificates from time to time, receiving fourteen renewal certificates (R. 38); the first ten of these certificates were in their joint names as receivers, and the last six, beginning Aug. 25, 1900, were in their joint personal names (R. 38); with proceeds drawn from a renewal certificate, they opened account No. 22990, as receivers, in said Trust Co. on Aug. 25, 1900 (R. 38); on July 31, 1900, the auditor filed his first report, debiting defendants with $24415.13, gross proceeds of sale, rentals and interest, and crediting them with $9324.38, for costs, charges and commissions, leaving a balance of $15090.74 for distribution to creditors of said Association (R. 36); said account No. 22990 was paid out *before the code* on eight checks for certain sums on certain dates, as shown by the ledger entries (R. 38), which show the dates and amounts of deposits and payments, but not the dates of checks *or the payees or endorsers* (R. 39); none of the checks on said account was produced or put in evidence, but it was shown that none was drawn to plaintiff in error or his order except one, dated Aug. 25,

1900, and payable to him as solicitor for Wm. T. Gilbert, Receiver, for $210.00, the proceeds of the sale of the personalty (R. 39), which were not included in the annulment decree (R. 33), the auditor having reported (R. 35) "that said decree of June 27, 1896, does not include the personalty or its proceeds", and which he therefore excluded from the accounting; on Nov. 8, 1901, with proceeds drawn from a renewal certificate, the defendants opened account No. 27260 in their personal names in said Trust Co., which account was paid out on 24 checks for certain sums on certain dates, as shown by the ledger entries (R. 38), which show the dates and amounts of deposits and payments, but not the dates of checks *or the payees or endorsers* (R. 39); only eight checks on said account were produced and put in evidence (R. 39), one of which was dated April 15, 1903, for $248.43, payable to the accused as solicitor for Wm. T. Gilbert, Receiver, for his costs of appeal (see 21 App. D. C. 344, 369, ordering payment of his and Stuart's costs from this fund), and nine of said 24 checks were payable to the accused directly, and endorsed by him and paid over the bank counter in cash without further endorsement (R. 39); one of said eight checks was for $1300, dated Sept. 8, 1903, from which the signature had been cut off; and another was for $1200, dated June 20, 1903, from which the signature other than that of the plaintiff in error had been cut out; said check of Sept. 8, 1903, originally bore the genuine signatures of both defendants; these two checks, together with prior checks, were delivered by the bank to Lipscomb or Fields in unmutilated condition; the U. S. Attorney stated that *he received these checks from Lipscomb thus mutilated* (R. 40); after said account No. 27260 was closed by the final check, with this check, bearing the genuine signatures of both defendants, they opened account No. 35191 in said Trust Co. in Fields' name "for Lipscomb and Fields", which account was paid out on 26 checks for certain sums on certain dates, 20 of which post-dated the indictment date, and five of which were apparently negotiated and cashed outside of the District of Columbia, as indicated by the endorsements thereon (R. 39); these 26 checks were put in evidence but *the court ruled out all the endorsements thereon* except of Fields, because no evidence was offered to prove the same (R. 41); on fifteen certain dates between Mar. 17, 1897, and

June 23, 1903, defendants drew fifteen certain sums from certain of said certificates; fourteen of said certificates. and seventeen of said checks, and twelve of said withdrawals *were prior to Jan. 1, 1902*, the date when the code took effect; certain of said withdrawals were deposited on the same dates to the credit of one or the other of said accounts Nos. 22990 and 27260; and the amounts of two certain other withdrawals, and of some of said checks, agree with the particular amounts of certain single credits allowed the defendants by the auditor in his reports; but certain of said withdrawals, and some of said checks, do not correspond with any single credits allowed by the auditor or claimed by the defendants (R. 39); on one of said certificates of deposit, dated Nov. 8, 1901, and in the personal names of the defendants, and matured Nov. 8, 1902, Fields endorsed Lipscomb's name on Nov. 11, 1902, in his usual handwriting, and without any attempt at simulation; and on the following day Lipscomb personally endorsed this certificate (R. 39-40); subsequently Lipscomb expressly verified to said Trust Co. that Fields had authority to sign his (Lipscomb's) name to checks relating to their accounts in said Trust Co., and specially ratified all checks to which Fields had signed his (Lipscomb's) name, being only four in all and amounting in all to only $1850; on each of said four checks Fields, after having signed Lipscomb's name thereto in his usual handwriting and without any simulation, wrote immediately after Lipscomb's name, in the same handwriting, the letter "F", being the initial letter of Fields' surname (R. 40); on Nov. 12, 1902, referring to his endorsement of Lipscomb's name on the certificate of Nov. 8, 1901, Fields said to Eckloff, in the presence and hearing of Lipscomb, that he had the power to do it, and it was all right, to which statement Lipscomb made no reply (R. 40); the last three checks on account No. 27260, and all of those on account No. 35191, were left to said Trust Co., but Fields could have had the books balanced and the checks delivered to him at any time he wished prior to this prosecution (R. 40); *the said accounts were carried on openly and without any concealment* (R. 40); by the auditor's report of Dec. 7, 1903, defendants are credited with additional costs, charges and commissions amounting to $746.43, leaving a balance of $15876.57, which is awarded to the four persons named as owners in the sixth count of the

indictment, in accordance with the opinion in 21 App. D. C. 344 (R. 36-37); the auditor's distribution to all the creditors of the Association by his first report of July 31, 1900 (which was held under *supersedeas* to a large extent until March 3, 1903), was vacated under the decision in 21 App. D. C. 344, but his credits of $9324.39 to the defendants for costs, charges and commissions were not disturbed (R. 37); the auditor's report of Dec. 7, 1903 (R. 36-37) was confirmed on May 5, 1904 (R. 47-48); one of the attorneys for Morrison, a distributee named in the sixth count, testified "that as far as his knowledge goes there has been no distribution to his client" (R. 53); one of the attorneys (*Mr. Henry E. Davis was chief counsel*) for Stuart, the principal distributee named in said sixth count and by the the largest creditor, testified "that so far as he knows there has been no distribution to" Stuart (R. 53); Edson was connected with the Association when it ceased business in 1894, and is the president of the said Washington Loan and Trust Co. where defendants kept their said accounts (R. 54); Mead saw Fields give Lipscomb a thousand dollars of the proceeds of the check of Sept. 8, 1903 (R. 54-55); Wall gave Lipscomb $500 for a check in that sum two or three years ago, *which money Fields gave him* to cash said check, in which Fields said he was interested; Wall cashed the check with this money, and then gave the check to Fields; Tyser testified (R. 48) that he was a local detective, he began to look for Fields in June, 1904, and found him in March, 1905, at Carpenter's house in New York, he heard Carpenter call the defendant by the name of Dr. Brown, to which name he responded, and consented to return to Washington; the Government also produced the deposit slips relating to said accounts, and proved each to be in the handwriting *of some certain clerk* in said Trust Company, and they were then put in evidence (R. 39).

(*b*) It must be remembered—a fact which the court below totally overlooks—that this evidence was practically *ex parte*, and that *the accused was arbitrarily deprived of any chance whatever to reply* to the Government's proof; however, every word of it may be true (which it is not), and yet every dollar may have been paid over properly, or still be in hand; and proof that leaves such outstanding conditions is not legal evidence of criminal conversion. Evidence

that merely proves that a fiduciary received money, that he deposited it in a bank, that he drew it out of that bank, and stops there, is not legal evidence of criminal conversion, because the prosecution is bound to prove in addition and beyond a reasonable doubt that he criminally converted it to his own use. The evidence in this case omits to show such conversion and fraud, and they cannot be presumed. Whenever the proof traces the application of any money drawn, *it invariably shows a proper disposition of it;* and the Government did not and could not trace a single one of the 92 items so as to show conversion thereof by the accused to his own use.

The bank (R. 38, 39), not the receivers, was responsible for the error in having certain of the certificates and accounts omit the word "receivers", but this omission, which began before the code (R. 38), was not proof of conversion.

Oftentimes slight but excusable delay in the payment of trust funds gives rise to the gravest of charges against the fiduciary by some in interest; and oftentimes the unexpected results of innocent acts are made the basis of charges that such acts were done fraudulently. No man of affairs is unfamiliar with these truths in human nature and life.

Concededly, the three checks (R. 38) on the West End Bank were not acts of embezzlement; and no criticism can be made of the certificates of deposit (R. 38) except that the last six, beginning August 25, 1900, ran in defendants' personal names. Two of the withdrawals were used (R. 38) to open accounts Nos. 22990 and 27260 on August 25, 1900, and November 8, 1901; certain others were deposited on the same dates to the credit of one of the other of said accounts, and two others agree in amounts with allowed credits (R. 39). This is no evidence that any withdrawal was converted to the accused's own use. Some might have been used to pay proper demands in cash; and such demands might have been composed in some instances of one item and in others of many combined. None of the eight checks on account No. 22990 was produced, but only the ledger entries (R. 38) which show the dates and amounts of payments, but not (R. 39) the dates of checks *or the payees or endorsers;* but it was shown that none was payable to the accused (R. 39) but one, dated August 25, 1900, to him as solicitor for Gilbert, receiver, for $210, the proceeds of the sale of the personalty; *but it was not shown to whom or for what purpose the others were drawn.* This account was opened

August 25, 1900 (R. 38), which was about one month after the auditor's report of July 31, 1900 (R. 35-36), which allowed defendants credits of $9,324.39, and it was closed before Nov. 8, 1901, when account No. 27260 was opened (R. 38). This is no evidence that any check against account No. 22990 was an embezzlement. Account No. 27260 was opened November 8, 1901, and was paid out on 24 checks, only eight of which were produced (R. 39), the others being shown by the ledger entries *which do not show the payees or endorsers;* one of these checks (R. 39) for $248.43, dated Apr. 15, 1903, was payable to the accused's order as solicitor for Gilbert, receiver, for costs of appeal; and nine of the 24 were payable (R. 39) to him "directly and endorsed by him and paid over the bank counter in cash without further endorsement"; therefore the accused must have embezzled them because *the prosecution could not show for what purpose or by what authority or want of authority they were drawn or what became of the proceeds.* It was not even shown that the money for these nine checks was paid to the accused; no attempt was made to show to whom or for what purpose any one of the other fourteen checks was drawn; yet the Government claimed that the drawing of each "in itself was an embezzlement", and they went to the jury as such. The auditor's first report (R. 35-36) was to a large extent held under *supersedeas* until after the decision in 21 App. D. C. 344, on March 3, 1903, to which fact the court below refers (R. 82).

By the auditor's report of December 7, 1903 (R. 36) additional credits of $746.43 were allowed defendants; and after that date (R. 39) twenty checks on account No. 35191 were drawn, but the court ruled out (R. 41) all the endorsements on all the checks on this account, except the accused's, because there was no evidence to prove them; therefore, the accused embezzled this whole account, and each check against it was an embezzlement in itself, so the Government claimed, and the court sent each to the jury as such. All of these checks were left in bank by the accused, as well as the last three on account No. 27260, but he could have had the books balanced, and these checks delivered to him, at any time he wished, prior to this prosecution (R. 40).

Is the suggestion too violent that some of these checks and withdrawals may have been used to pay the $10,070.82 allowed defendants (R. 36) for costs, charges and commissions? Or that they

may have been used to open other proper accounts in other banks? Or for other proper purposes?

The only evidence that the balance had not been paid over, "being the property and moneys of the Washington Beneficial Endowment Association, a body corporate", was that of Mr. Robinson (R. 53), attorney for Morrison, one of the sixth count owners, that there had been no distribution to his client so far as his knowledge goes; and that of Mr. Padgett (R. 53), attorney for Stuart, also one of the sixth count owners, that there had been no distribution to his client so far as he knows. This is mere negative testimony—that these attorneys do not know a certain fact. The other two sixth count owners were ignored in proof. There was no proof that any were alive, or where they lived.

There was no evidence whatever that the Association had not been paid, or of any demand by it or refusal to pay it; yet it alone was the sole, absolute, and exclusive owner of the entire money, according to the indictment, the prosecutors, the jury, and the judgment in this case, notwithstanding the order of distribution (R. 47-48) and the other evidence in this record, which conclusively disprove such ownership. Had such proof been attempted, the prosecution would have met a condition of corporate dissolution instead of a theory of corporate existence. It was necessary, in order to reach the conviction desired, to try this case on theories of facts and law instead of conditions; and that this was done this record stands as the living proof.

There was nothing to show that prior to this indictment the accused had any knowledge of the final order of distribution of May 5, 1904 (R. 48), or that he was here when or at any time after it was passed until March, 1905, or that any demand for payment had ever been made on him by anybody, or that he had ever refused to pay; it was not shown when or for what reason or under what circumstances he went to or was in New York; it was not shown that he had ever misappropriated the money or any part of it, or that any proceedings against him had even been taken in the chancery court; but *the accused was convicted simply because he was a lawyer*, and therefore without the pale of the Sixth Amendment, and because the trial judge and prosecuting attorneys were bent on conviction at any cost. The very atmosphere of the whole trial was acutely

charged with the fear of unwarranted charges from the bench of contempt of court.

The alleged offense is of an exceedingly odious character, and especially so as against a lawyer acting as a chancery receiver in an aggravated case intimately affecting several thousands of local persons; and the trial judge should have been especially astute to protect the rights of the accused from the effects of the natural but intense prejudice which such a charge engendered; but he did quite the contrary.

The defects of the Government's prayer as to conversion (R. 58, Pr. 5, Ex. 32) are stated in our objection thereto. "It is sufficient if any part of such sum was "converted, said the court, though there is no proof of that fact; the jury should have been confined strictly to the evidence, and not left at liberty to substitute assumption or belief or speculation for proof.

There was testimony (R. 54-55) that the accused had delivered to Lipscomb one thousand dollars of said money on September 8, 1903, in Mead's presence, derived from the $1,300 check (R. 40) of that date; the court ruled this testimony a perfect defense as to the item of one thousand dollars (R. 55-56); but refused a prayer (R. 63, Pr. XXVII, Ex. 45) telling the jury that if they believe "from the evidence that any part of the sum of money mentioned in the indictment was delivered by the defendant Fields to his co-receiver Lipscomb, then they are instructed, as matter of law, that as to that money so delivered the defendant Fields is not guilty of embezzlement, and they shall so find." There was no evidence that said money had been delivered to Lipscomb for any improper purpose; and hence the refusal of our prayer was utterly inconsistent with the prior ruling (R. 56), and was equivalent to saying that the accused could be convicted of converting *to his own use* money which he had lawfully and for proper purposes delivered to Lipscomb; *and this was done.* The court below indeed says (R. 82-83) in effect that this was done, and properly done, in its opinion.

(c) It is a rule of law that the instructions given by the trial court will be regarded as the law of the case in the appellate court, in testing the sufficiency of the evidence to support the verdict. 2 *Cyc.* 725.

(1) Based solely upon Tyser's testimony (R. 48), the trial judge granted the Government's prayer telling the jury to consider the

evidence "which tends to prove that the defendant was a fugitive from justice," and if they find that he did flee from justice, that fact, "while not conclusive evidence of guilt," may, unless explained, "be accepted by the jury as circumstances [*sic*] tending to prove that he regarded himself as guilty" (R. 57-58, Ex. 31). This prayer was an incorrect statement of the law, and was not justified nor supported by the evidence, and was misleading, especially in the use of the words "conclusive" and "tends to prove". The court refused to tell the jury that the mere fact that the accused was absent from this District when unlawfully arrested, does not raise any presumption of itself, even though unexplained, that such absence was on account of the charge in this case, and that even if so, it does not of itself create any presumption of his guilt (R. 63, Pr. XXII, Ex. 43); but the court then charged (R. 69), inconsistently with the government prayer granted, that if the jury found flight for the purpose of avoiding prosecution for this particular offense, they should consider that as tending to prove guilt; and if he fled, but his flight was not connected with this particular offense, then it should have no influence one way or the other. Which instruction did the jury follow?

The testimony shows no connection whatever between the accused's absence and this charge; but such direct connection is absolutely necessary. *U. S.* v. *Williams*, 168 U. S. 382, 396. *State* v. *Palmer*, 32 La. Ann. 565, 575. The Government's granted prayer was bad in substance, but ours was good. *Hickory* v. *U. S.*, 160 U. S. 408, 422. *Alberty* v. *U. S.*, 162 U. S. 499, 508. *Starr* v. *U. S.*, 164, U. S., 627; 631. The fact that the granted prayer and the charge were inconsistent, is error. *Bank of Metropolis* v. *New England Bank*, 6 How. 212, 226. *Clem* v. *State*, 31 Ind. 480, 483. *Spivey* v. *State*, 26 Ala. 90, 102, 103. *People* v. *Messersmith*, 57 Cal. 575, 576. This is true, even though the charge was partially correct, because it is wholly impossible to determine which of the two statements was received and acted upon the jury. *Mills* v. *U. S.*, 164 U. S. 644, 649. *Hickory* v. *U. S.*, 160 U. S. 408, 422 This principle operates in the present case in many other instances of conflict between the granted prayers and the charge, and between the rulings on the evidence and the charge, etc. The proof was wholly insufficient to show flight. *People* v. *Page*, 116 Cal. 386, 397. The court had no right to leave this question to the jury at all.

(2) The trial judge told the jury that they must find from the evidence, beyond a reasonable doubt, that the accused fraudulently converted the money, or some part of it, to his own use (R. 60, Pr. X; R. 61, Pr. XI); that the intent to defraud is essential, and means a criminal intent to deprive the owner absolutely of the said money (R. 61, Pr. XIII); that a mere failure of the accused to pay over the moneys mentioned in the indictment, even though unexplained, does not raise any presumption that he has fraudulently converted or appropriated such moneys to his own use; nor does the mere fact that he may have converted or appropriated such moneys to his own use, create a presumption that the same was done fraudulently (R. 61, Pr. XIV); that the evidence must be of such force as to exclude every reasonable hypothesis of his innocence (R. 62, Pr. XV); that the law presumes, and they are "bound to assume," that the accused is innocent of the charge against him; that this presumption does not yield to a mere preponderance of evidence tending to show his guilt, but only to evidence which establishes his guilt beyond a reasonable doubt (R. 62, Pr. XVI).

These granted instructions of ours accord with the well settled law in the principles announced. Measured by them, how can it be rationally said that the evidence of conversion in this case is sufficient in law to support the verdict? The words of the court in the embezzlement case of *State* v. *Carmean*, 126 Iowa 291, 299, are exactly in point in the case at bar:

> "THE DIFFICULTY WITH THE WHOLE THEORY ON WHICH THE CASE WAS TRIED IS THAT IT SANCTIONS A CONVICTION FOR A CRIME WITHOUT ANY EVIDENCE EITHER OF ANY CRIMINAL ACT OR ANY CRIMINAL INTENT ON THE PART OF THE DEFENDANT."

In *People* v. *Page*, 116 Cal. 386 (1897), the accused was indicted and convicted of embezzlement on the following evidence (pp. 392-394):

> On Jan. 3, 1891, Page, who was then district attorney for the city and county of San Francisco, was appointed as guardian of the estate of one Lichtner, an insane person, and gave the bond required; letters of guardianship were issued; on Apr. 4, 1891, the court ordered him to file his account, but this order was not

obeyed until May 4, 1894; on June 2, 1892, he paid the asylum officers $190, and had a balance of $3776.92; when appointed, there was on deposit in bank, to the credit of his ward, $3561.01; of this sum and accumulated interest, Page, as guardian, drew out from time to time all but $51; his first check was for $353 on Apr. 24, 1891, and his last for $49.27 on Sept. 7, 1892; on June 12, 1894, the court ordered him to pay the asylum officers $475, due for the care of the ward; Page did not pay, and on July 3, 1894, an attachment was issued, but was returned unserved; on Aug. 15, 1894, another attachment was issued, but it was also returned unserved, and nothing further was done for a year; the judge testified that he did not know what Page's reasons were for not paying the money as ordered; another witness said he had been in the habit of visiting the asylum about once in six weeks, and met the ward there, and during the first part of the time he saw him he was in the pay-ward, but during the latter part he was in the pauper-ward; on May 2, 1895, the court ordered Page to appear on the next day, and show cause why he should not file his account; citation was issued and returned unserved; on May 3, 1895, the court ordered Page to appear on May 10, and show cause why he should not be removed as guardian; citation was issued and returned *non est;* the court then caused citation to be published, fixing May 20 as the date for Page to appear and show cause against removal; after publication of the citation, Page called on the judge at chambers, and asked for a postponement until May 27, which was granted; on May 27 he again called, and asked for a further continuance until the next day, which was also granted; on May 28 he did not appear, and an order was passed removing him as guardian of said estate; no other order was made, and no person was appointed in his stead, and no demand was made on him for the money of his ward in his possession; the order of removal contained a recital that it appeared to the satisfaction of the court that Page had appropriated to his own use the funds of said ward, and had rendered no account thereof; this order was received in evidence over Page's objection; in January, 1896, he was arrested in New York city, and stated to the arresting officer that he was anxious to return to stand his trial for the offense with which he was charged.

At the close of this evidence, Page moved for acquittal for its insufficiency, but his motion was overruled, and the case was submitted to the jury without further testimony. On appeal, the evidence was held wholly insufficient in law to support the verdict and judgment against the accused.

The court said (p. 395) that no order of appointment of another in his stead was made; no demand was made on him for his ward's money; there was no other evidence to show that he ever spent, wasted or appropriated to his own use any money of his ward, except the recital in the order of removal, which was incompetent as hearsay; the fact that he drew out of bank most of his ward's money, was not a criminal act, and did not show a criminal intent to misappropriate the money, such withdrawal being consistent with some other deposit or lawful use of the money, and with the supposition that at the time of the trial he might still have had all the money ready to be paid over on demand to any one authorized to receive it; the fact (pp. 395-396) that Page, when ordered to pay a certain sum to the asylum officers, did not pay it, does not tend to show a misappropriation of that sum of money, as he may have believed that his ward was kept in the pauper-ward, and that they were not entitled to pay; the failure of the accused to testify could not be taken into consideration (p. 397) by the appellate court on the point of the insufficiency of the evidence to justify the verdict, but he must be presumed to be innocent until proved to be guilty; the fact that he was arrested in New York does not warrant any inference that he was a fugutive from justice, where there is nothing in the record to show when or under what circumstances he left San Francisco and went to New York, as he may, so far as the evidence shows, have gone there on business or pleasure, intending soon to return (p. 397).

In *People* v. *Royce*, 106 Cal. 173, the defendant, who was the treasurer of an association, deposited the trust money to his personal account in bank, and was convicted of embezzlement and appealed because the verdict was not justified by the evidence. The court reversed and said (pp. 176, 177):

> "What became of this balance does not appear. Appellant may have had it ready to be produced whenever called for. * * * It does not appear that appellant ever had a successor in office. * * * There is no

> evidence that any demand was ever made upon appellant for said money by the association, or by any officer or agent thereof, or by any other person. * * * He may have had the money all that time ready to respond to any demand of the association. In fact, there is no evidence that he did not pay it over to the association. It is clear that he did not clandestinely keep it."

(3) In the present case, no demand for the money was ever made on the accused by anybody; but this was necessary. *State* v. *O'Kean*, 35 La. Ann. 901, 903. *State* v. *Reynolds*, 65 N. J. L. 424, 431. It would have been necessary before even a civil action on a receiver's bond could be maintained. The proof shows no concealment or denial by the accused, but the most open conduct. The evidence of conversion consists exclusively of bank accounts, yet *"the said accounts were carried on openly and without any concealment"* (R. 40). "It is always relevant, and indeed indispensable, to prove some kind or degree of concealment by the accused, either of the property or of the facts regarding its disposal." *Underhill Cr. Ev.* section 287. *State* v. *Fleener*, 58 Ark. 98, 104. 2 *Bish. Cr. Law*, sections 360-362. See *Staples* v. *Johnson*, 25 App. D. C. 155, 159. *State* v. *Reilly*, 4 Mo. App. 392, 399. Where is any such proof in this case? The accused left all checks on account 35191 and the last three on account 27260 in bank, which checks he could have had at any time for the mere asking (R. 40). *Does this look as if they represented embezzlements?*

The receivers were appointed on Nov. 6, 1894; the code was passed on March 3, 1901, and took effect on Jan. 1, 1902; the embezzlement is alleged to have occurred on Nov. 23, 1903; before the code, there was no law against embezzlement by receivers. *Why should the accused have faithfully performed their duties as receivers for more than eight years before the law, and then, on its enactment, promptly proceed to embezzle this fund?* The idea is as preposterous as it is false.

> "Suspicion is not proof, and cannot be allowed to take the place of proof." *Brown* v. *Petersen*, 25 App. D. C. 359, 363.

(4) Proof of failure to pay over funds, even when properly demanded, is not sufficient to warrant a conviction of embezzlement,

even though wholly unexplained. *State* v. *O'Kean,* 35 La. Ann. 901, 903. *State* v. *Smith,* 13 Kan. 274, 297. *Thomas* v. *Dunaway,* 30 Ill. 373, 389. *Snell* v. *State,* 50 Ga. 212, 222. *Fleener* v. *State,* 58 Ark. 98, 104. *State* v. *Reilly,* 4 Mo. App. 392, 397. *State* v. *Marco,* 32 Ore. 175, 177. *Robinson* v. *State,* 109 Ga. 564, 565 (bottom). *Ehrhart* v. *Rork,* 114 Ill. App. 509, 511 (bottom).

There is no proof that what the accused did was not done with his joint owners' knowledge and consent, or by the orders of the appointing court; but the record is absolutely silent on this point. Why? The district attorney had all of the orders to pay and invest, and all of the other equity papers and records in No. 15907, in his exclusive possession before, during and after the trial. Why did he not prove that the acts of the accused were without the authority of the chancery court, if such was the fact? Is not the reason as obvious as the actual fact is true? The evidence must clearly show the commission of the offense, and bring the act strictly within the statute. 15 *Cyc.* 532.

(5) Criminal intent to defraud is essential, and if the evidence is not absolutely inconsistent with good faith on the part of the accused, he must be acquitted. *McElroy* v. *People,* 202 Ill. 473, 479. *Robinson* v. *State,* 109 Ga. 564, 565. *Hamilton* v. *State,* 46 Neb. 284, 287. *Fleener* v. *State,* 59 Ark. 98, 104. *State* v. *Marco,* 32 Ore. 175, 177. *Meyers* v. *State,* 4 Ohio C. C. Rep. 570, 576. *State* v. *Schilb,* 159 Mo. 130, 140. *State* v. *Ames,* 119 Iowa 680, 683. 15 *Cyc.* 458.

The felonious intent to defraud cannot be inferred from the mere fact of conversion; or, as held in *State* v. *McDonald,* 133 N. C. 680, 682, 684:

> "In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud."

This is the settled rule. *Snell* v. *State,* 50 Ga. 219, 222. *State* v. *Reilly,* 4 Mo. App. 392, 397. *Ehrhart* v. *Rork,* 114 Ill. App. 509, 511 (bottom). In *State* v. *Carmean,* 126 Iowa 291, 298, 300, it is further held that the necessary intent cannot be inferred even from the inevitable effect of the act done, without more. In embezzlement, the intent to defraud can no more be shown by the mere

conversion than can the felonious intent in larceny by the mere taking.

(6) Is it not passing strange that there is no proof in this case as to the attitude of the appointing court, or of any charges to it or action by it as to the alleged misconduct of its receivers? Would not that court have had some say in the matter, and have acted very promptly, if there be any truth in this infamous charge? Yet we have not one word, even to show that the plaintiff in error had ever been accused or removed as receiver; and hence it is open to us to argue what is the actual fact, namely, that there never were any proceedings or charges whatever against the accused in the chancery court, or in any other court except the criminal court. Truly, a remarkable state of affairs, if the accused be guilty of embezzlement.

(*d*) The indictment (R. 2) charges the embezzlement of money as such, and nothing else; yet the court admitted in evidence (R. 38-39) 61 private checks and 16 time certificates of deposit, which were not money. They were inadmissible, because fatally variant from the charge of the pleading, and because the statute itself expressly distinguishes among "money, securities or other property". *Goodhue* v. *People*, 94 Ill. 37, 48 (charge of conversion of money; proof of county orders). *Carr* v. *State*, 104 Ala. 43, 55 (charge of conversion of bank-notes and money; proof of check). *Stewart* v. *State*, 62 Md. 412, 413 (charge of larceny of promissory notes; proof of silver certificate). *State* v. *Schilb*, 159 Mo. 130, 142 (charge of conversion of money; proof of personal property). *Weimar* v. *People*, 186 Ill. 503, 507 (charge of conversion of money; proof of town orders for which the accused had given receipts as money). *Thalheim* v. *State*, 38 Fla. 169, 204. 15 *Cyc.* 525.

(*e*) The $24,415.13 plus the $1532.26 (R. 36) were received at various times, in various amounts, from various persons, and for various obligations, and for various purposes; by many special and a few general orders which the prosecuting attorneys had in their possession, the receivers were directed to pay out various sums, at various times, to various persons, and for various purposes; they were not required to retain or pay out the identical moneys or orders or checks received; *no particular sum was shown to have been converted to his own use by the accused;* the sum charged in the indictment is a mere paper-stated and then unsegregated bal-

ance of the gross amount received (R. 36) ($25947.39), on the auditor's statement of account (R. 36); this proof is not sufficient to support the indictment. *People* v. *Howe,* 2 Thompson & Cook (N. Y.) 383, 386. *Reg.* v. *Walstenholme,* 11 Cox C. C. 313, 314.

(*f*) The deposit slips (R. 39), made up entirely by the bank clerks, without the direction or knowledge of the accused, were inadmissible. In *State* v. *Carmean,* 126 Iowa 291, entries on the books of the company, of which the accused was an officer, made by clerks in the usual course of their employment, but without the express direction or knowledge of the accused, were allowed in evidence. The court in reversing the conviction for embezzlement, said (p. 301):

> "So far as these entries were relied upon as showing the misappropriation of the money with which defendant was charged, they were not admissible. *State* v. *Ames,* 119 Iowa, 680," 684.

The mere fact that the plaintiff in error checked against the accounts, or that witnesses testified that the deposit slips and ledger entries were in their handwritings and true, did not make these incompetent documents admissible.

(*g*) A very grave question is presented by the fact that the Government, over objection and exception (R. 41, Ex. 14), was permitted to prove, under this indictment in but one count alleging but one act on one certain date, *no less than ninety-two separate and distinct items, each as a substantive offense.* We have already said that we have no statute here dispensing with the particulars in embezzlement, so as to allow evidence of a series of acts, or of all that the accused did by virtue of his office or employment, to go to the jury without election, leaving them a license to convict on the whole. The embezzlement statutes of some States permit this, and a few cases uphold such practice under them, and sustain their constitutionality upon the ground of the right and duty of the trial court to grant the accused a bill of particulars on demand.

The sole reason upon which such statutes are based, and evidence of various acts is admitted, is the difficulty or impossibility of proving any specific conversion; but this reason has no place whatever in the present case, because each transaction (R. 38-41) was in itself not only capable of distinct proof, but was in fact so proved *and only so proved.*

The accused has the right to be informed of the nature and cause of the accusation against him. In this case he was informed by the indictment of one specific accusation, yet the Government made no attempt, even, to prove that (R. 40), but proved 92 other and distinct acts as the accusation, and claimed (R. 69) that *each was in itself a substantive act of embezzlement;* and neither made, nor was required to make, any election among these acts, but relied on each and all as the offense charged in the indictment.

By our motion for a bill of particulars (R. 7-8) which was overruled (R. 17, 29, Ex. 2), we sought to have the prosecution specify or elect the particular act or item and evidence on which it intended to rely, concerning which the indictment gave us no information if the Government did not intend to rely on the specific act therein stated, of which intention the prosecution had full knowledge, but we had none—not even information. We especially objected to the Government's being permitted to show, under this indictment charging only a single act, *"any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day"* (R. 41, Ex. 14). This objection went to all such evidence and to the principle on which it was received, but it was overruled, and we excepted. It was unnecessary again to object and except at any stage of the case, in order to save the point for review—not even to the charge to the jury.

To each and all of the certificates of deposit, withdrawals and checks, we specifically objected, were overruled, and excepted (R. 40, Ex. 13). We also made a special objection to the last 20 checks on account No. 35191, all of which post-dated the indictment date November 23, 1903, but were overruled, and excepted (R. 41, Ex. 14). Appellant was neither indicted for, nor informed of, any one of the 92 acts, and the Government had not right to try him on any one of them, unless, at the beginning of the trial, it elected some one single, particular act or item like the one alleged as that, and that alone, on which it would rely; and when it both failed and refused to do so, with the court's approval, the law itself inexorably elected the act or item first proved as that, and that only, on which the prosecution could rely. Here the act or item of alleged embezzlement first proved was not only perfectly innocent *per se,* but also preceded the code itself, and was barred by the statute of limitations. Without stopping to make any selection, it is very certain

that some one of the 43 acts or items which preceded the code was that first proved. The election first made by the prosecution or the law is final, and cannot be abandoned.

Every one of the 92 acts or items in evidence was independent of all of the others, and each had and left its own separate and indelible record, complete in itself; and it required none of the other 91 acts or items to prove or explain it. As the case was presented, we have no particular act or item relied on—in short, *no corpus delicti*. It would have been just as proper to allege the 92 acts in one count and prove one, as to aver one and prove 92, unelected as to all, and variant and barred and before the law as to many. The law requires that there shall be but one *corpus delicti* to one count, but here we have 92 or none.

The general rule, of course, is that evidence tending to show that the accused has committed, or attempted to commit, other offenses, independent of that charged, is inadmissible. The rule applies equally whether the other offenses be similar or dissimilar to that charged. To this rule there are certain exceptions, one of which allows such evidence to show the intent of the act charged, but not to prove such other acts as substantive offenses. The first requisite is a *corpus delicti*—one definite act—which must first be proved, as well as defendant's connection therewith, before evidence of other offenses is admissible.

Of course, if there is no *corpus delicti* properly designated and proved, there is no possible basis for evidence of various offenses, for in such case they cannot be proved as other than substantive offenses. You cannot give evidence to aid the proof of the principal act if *there is no principal act*, as was pointed out by the court in *People* v. *Flaherty*, 162 N. Y. 532, 542, in *People* v. *Williams*, 133 Cal. 165, 169, and in *People* v. *Castro*, 133 Cal. 11, 13. What is the principal act—the *corpus delicti*—in the case at bar? In *People* v. *Howe*, 2 Thomp. & C. (N. Y. 1873) 383, the court said (p. 386):

> "The conviction in this case seems to have taken place under *an entire misconception as to what constitutes the crime of embezzlement*, the mode in which it is to be charged, and the evidence by which it is to be established. * * * Each specific act of embezzlement is a specific offense, and must be so charged with all necessary certainty and particularity to enable the defend-

ant to understand and prepare to meet the specific charge. * * * *Some specific sum must be proved to have been embezzled,* the same as in larceny some particular article must be proved to have been stolen. The course adopted in the case at bar subjects a party to be required to meet any number of distinct offenses under *one count* in the indictment, and to a conviction, *if any one of a hundred distinct offenses sought to be proved* should be found to be established."

In *People* v. *Williams,* 133 Cal. 165, the court said (p. 169):

"Many alleged acts were specifically described with circumstances of time, etc. Each of these acts was a separate offense, and the defendant could be tried for either, and separately for each of them. The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurrors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend when *he was not informed as to what particular offense, out of hundreds* testified to by the prosecutrix, he was to be tried? Such a trial, upon a charge so indefinite as to circumstance of time or place, or any particular, except by the general designation, would be *a judicial farce, if it were not something a great deal worse.* That it was wrong, was held in the recent case of *People* v. *Castro",* 133 Cal. 11, 13.

The same principles are very emphatically declared in *People* v. *Flaherty,* 162 N. Y. 532, 538.

In *Edelhoff* v. *State,* 5 Wyo. 19, an agent was charged with the embezzlement of monthly rents; he reported that the premises were vacant; proof was admitted of all the monthly conversions; no election was asked, and no instruction was given limiting the evidence to a single act or item; the jury returned a general verdict of

guilty; the court reviewed many authorities, reversed and said (p. 28):

> "It seems to us that the offense of embezzlement was complete in each month, as all the elements of the crime were present, and the offense of embezzlement was complete. These monthly offenses were not dependent upon each other, and taken together, do not constitute a single fact of one endeavor. *Neither was the offense a continuing one,* as it presents none of the conditions of the old illustration—that of a felonious taking of gas from a main or wine from a butt by means of a tube, where the felonious asportation was uninterrupted and continuous. * * * *Each transaction is separate and distinct,* and in no manner dependent upon another."

In *Kribs* v. *People,* 82 Ill. 425, the defendant was convicted of embezzlement, and sued out a writ of error. The court said (p. 426):

> "On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment, the law did not require him to come prepared to meet other charges, nor does it follow, because he may have been guilty of other like offenses, he was guilty of the offense charged in the indictment. The evidence should have been confined strictly to the offense charged in the indictment."

It is well settled that *"only one act of embezzlement, and upon a single day or occasion, can be shown under this indictment". Com.* v. *Bennett,* 118 Mass. 443, 448, 453. *Goodhue* v. *People,* 94 Ill. 37, 51. *People* v. *Hurlburt,* 92 Hun. 46, 48, 50. *Com.* v. *Shepard,* 1 Allen 575, 581. *Hoyt* v. *State,* 50 Ga. 313, 322. *Rex.* v. *Williams,* 6 C. & P. 626 (bottom). "Evidence of different acts to prove the one charge [of embezzlement by a guardian] can not be received, but * * * the State must elect as to one act upon which it relies to prove the charge." *Myers* v. *State,* 4 Ohio C. C. Rep. 570, 574. Evidence of other transactions, even though criminal, is inadmissible unless they tend to show criminal intent with reference to the mis-

appropriation of the particular money charged in the indictment. *State* v. *Carmean*, 126 Iowa 291, 299.

In *Com.* v. *Wyman*, 8 Metc. 247, the court said (pp. 254, 259):

> "A bank officer, when accused of embezzlement, must be charged with a specific act of fraud, as in larceny at common law, and be proved guilty of the specific offense charged. • • •
>
> "The ruling of the learned judge, in admitting evidence, under this indictment, of *several acts of embezzlement, cannot be sustained.*"

If the prosecution does not intend to rely upon the act charged in the indictment, then it is *bound to elect* some one specific act upon which it will rely for conviction. In the quite remarkable case of *People* v. *Flaherty*, 162 N. Y. 532, the court said (p. 539) that the accused is entitled to know at the beginning of the trial whether he is to be tried for an offense committed on the day alleged in the indictment; and if not, then the prosecution must state the offense which it is proposed to prove as the one charged in the indictment; and it is prejudicial error to refuse to compel an election, or to postpone the election, until the close of the prosecution's case; for the accused is only required to come prepared to meet the specific charge of the indictment against him.

The same doctrines are declared in *People* v. *Williams*, 133 Cal. 165, 169, *People* v. *Castro*, 133 Cal. 11, 13, and *State* v. *Nagle*, 14 R. I. 331, 334.

In *State* v. *Bates*, 10 Conn. 372, the court said (p. 373):

> "The accused comes prepared to defend against a single charge. This he may do successfully, and, having done so, may find himself overwhelmed by a multitude of others of which the information gave him no notice, and against which he cannot be supposed to be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court and jury by proving any number of offenses, and then elect on which to claim a conviction. Why should this be done? He is supposed to be in the possession of the proofs, and should make his election from the first."

Election can be compelled either by a direct motion to that effect, or by an objection to evidence of more than one act; or as said in *State* v. *Chisnell*, 36 W. Va. 659, 663:

> "The defendant did not in this case move that the State should elect the sale on which it would stake its case, but she objected to evidence of another sale; and this, it seems to me, called upon the court to give her the benefit of that objection by the only proper order which could give her its benefit, that is, by ordering the prosecuting attorney to make such election."

The rule requiring election is universal, if the proof shows more than one offense. *The accused is entitled to know the specific act* which is relied upon, so that he may properly meet the charge, and in order that conviction *shall not be a matter of choice between or among offenses.* While there is some conflict as to the time of election, all of the courts agree that it must be made before the accused is required to give his proof. After election, evidence of other substantive offenses is inadmissible. The election must be definite enough to inform the accused clearly of the particular act relied upon for conviction; and when once made, it cannot be retracted.

If the prosecution fails or refuses to elect, then the law elects the first act as to which evidence is offered. *State* v. *Hilberg*, 22 Utah 27, 33. *People* v. *Jeness*, 5 Mich. 305, 327. *People* v. *Clark*, 33 Mich. 112, 115. *State* v. *King*, 66 Miss. 502, 507. *People* v. *Williams*, 133 Cal. 165, 169. *Richardson* v. *State*, 63 Ind. 192, 193. *Fields* v. *Territory*, 1 Wyo. 78, 81. *State* v. *Nagle*, 14 R. I. 331, 334. *State* v. *Chisnell*, 36 W. Va. 659, 662. *State* v. *Brunker*, 46 Conn. 327, 329. *Lovell* v. *State*, 12 Ind. 18, 19. *Elm* v. *State*, 26 Ala. 48, 51. *McPherson* v. *State*, 54 Ala. 221, 223. *Hughes* v. *State*, 35 Ala. 351, 361. *Sullivan* v. *State*, 68 Ala. 525, 529. *Jackson* v. *State*, 95 Ala. 17, 18. *McDonald* v. *People*, 126 Ill. 150, 165.

What is the principal act, or the act first proved in this case? How is it possible to designate one? Is it not clear that there never was one? How could the accused defend himself?

Let us assume that we have a principal act charged and adhered to in this case; proof of other prior offenses (*sic*) is admissible, not as substantive offenses, but only to aid the proof of some essential element of the principal act, such as the fraudulent intent. The

conviction can be based only upon the principal act, and never upon those called in to aid the proof of it. It is imperative, however, that the other acts shall be shown to be actual offenses in and of themselves. *Gassenheimer* v. *State,* 52 Ala. 313, 318; *Gassenheimer* v. *U. S.,* 26 App. D. C. 432, 443, and cases therein cited.

Without entering into a discussion of the many phases of the law relating to evidence of other offenses, and the exceptions to the rule prohibiting such evidence, which would only intensify the errors in this case, is it not very clear that the course pursued respecting the proof of the alleged conversion was in gross violation of the rights of the accused? Is it possible to justify it? There was not a scintilla of proof or even claim or insinuation of any "plan to embezzle", but this idea was for the first time interjected into the case by the trial judge, who said to the jury (R. 69-70):

> "If you find from the evidence that after January 1st, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived plan, *then you would be justified in finding him guilty concerning all the embezzlements* that you find the proof makes out."

By this charge each of the 92 items is received as in itself a substantive act of embezzlement, and not merely to aid the proof of some particular one of them elected by the prosecution or the law; the defendant is to be convicted of 92 separate, unconnected and distinct acts, items or transactions under one count charging but a single act on a certain date, though none of these acts is proved to be an act of embezzlement, there is no proof of any connection between them, 43 of them preceded the code, 61 involved private checks which were not money, and 16 related to time certificates of deposit which were not money. *Of what has the accused been convicted?* Certainly not of what he was charged with, for the Government made no attempt even (R. 40) to prove that charge as laid. The rational way is to prove the plan first, and then the prior acts done in pursuance thereof, not as substantive offenses but only in aid of the proof of the particular act relied on as the *corpus delicti.* What was the "plan" in this case? Where is the evidence of any "plan"? None, absolutely none.

In each of the "plan" cases there was a single, specific act alleged or elected as the principal act relied on as the *corpus delicti;* the plan was first shown, and then the evidence of the prior contemporaneous offenses committed in pursuance thereof, and to prepare the way for the commisssion of the principal act, was received, not as substantive offenses, but only to aid the proof of the principal act; and this not unless the evidence clearly showed a direct connection between the prior offenses and that relied on by the prosecution. There is no proof at all of any connection as offenses among these 92 items, though it is necessary. The word "justified" in the charge (R. 70) was misleading. We cannot find nor conceive of any case to justify the evidence and charge in this case as to the 92 acts or items. On no tenable theory can the procedure in this case be sustained, under the Constitution and the laws.

The trial judge, after having told the jury they could convict of all acts shown, then told them in the alternative (R. 70):

> "But if you find there was not such a plan preconceived by him before a first embezzlement, and conclude from the evidence that each conversion by him * * * was in itself distinct from every other * * * , then you would only be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree."

Which instruction did the jury follow? If that just quoted, upon what (if any) "one single conversion" did they agree? Did all agree upon the same one? Who can tell? Did they convict of some payment made under some specific order of the chancery court, or of the Court of Appeals? Was the accused not entitled to be informed of the "one single conversion, concerning which all of you must agree"? Was no *corpus delicti* required to be made known to him? Had he no right before, during, or after the alleged trial, to be informed of the nature and cause of the real accusation against him? Our prayers for a verdict on all the evidence (R. 59, Pr. 1, Ex. 35; R. 59, Pr. IV, Ex. 36) should surely have been granted.

(*h*) On the evidence in this case, it is of course impossible from any view-point for Lipscomb to be innocent and the plaintiff in error guilty; and as Lipscomb was acquitted on this same government proof, when tried a few months after this alleged trial, both re-

ceivers must be innocent. Certainly the evidence is not sufficient to warrant a conviction of either. Why was Lipscomb acquitted and Fields convicted? Simply because the former was accorded the rights summarily denied the latter, and things as to either were not as they seemed to some then intensely prejudiced persons.

(*i*) Among other things, the Government put in evidence (R. 34) three certain reports of the accused, as admissions by him of the alleged fiduciary relation and the receipt and possession of the money; to each of which reports the accused duly objected and excepted (R. 34-35, Ev. 11). With the equity case No. 15907, mentioned in the indictment, three others, to each of which the accused was a party defendant, were consolidated (R. 48-49). He was required to appear before the said court and its auditor, as a witness or a party or a receiver in all four cases, and at three different times before the code was passed, he was compelled to prepare and produce and file these reports. As to them the court below says (p. 80) that "the reports signed by defendant and his co-receiver showed that the amount charged in the indictment was in their possession by virtue of their appointment and acceptance of the trust." Farther on (R. 81) the court says:

> "The several receivers' reports showing their account and the possession of the balance charged in the indictment, were not only shown to be papers belonging to the record of the equity suit, but defendant's signature thereto was proved."

The trial court is a court of the United States, so declared by statute, and so decided time and again since its creation. This proceeding involves both a charge of crime and a pecuniary forfeiture. The said reports were inadmissible under *R. S. U. S.*, section 860, which is in full as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

Like as to many other points, the Court of Appeals is wholly silent as to this; but not because it was not properly presented and fully argued in that tribunal.

(*k*) As we have pointed out, the proof of the alleged fraudulent conversion in this case is in substance (R. 37-41) merely that the defendants (1) received the money, (2) deposited it in banks, and (3) drew it out of banks, without more; except that in one instance, concerning a certain check (R. 40), it was shown without any contradiction (R. 54-55) that the accused cashed it at bank, and at once delivered $1,000 thereof in money to his co-receiver Lipscomb in the presence of the witness Mead, but there was no proof whatever of any improper purpose, or of any purpose, for which the accused so delivered the said money; and as to this very item, the ruling of the trial court (R. 55-56) on the Government's objection and in the jury's presence, and the opinion [R. 83] of the Court of Appeals in its attempt [27 App. D. C. 448] to do the impossible, viz: to point out the particular act, item, charge or offense (if any) of which the jury convicted, are as follows:

TRIAL COURT.

"It is quite clear to me that if you charge a receiver with embezzling one thousand dollars, it means that he wrongfully converts it to his own use. If he shows that he did not wrongfully convert that thousand dollars to his own use, but gave it to his co-receiver, who, under the law, was entitled to have possession of it, *that is an absolute defense to that item.*"

COURT OF APPEALS.

"There being no single circumstance tending to show that it was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful but also *a fraudulent conversion of so much of the fund.*"

In this case the Court of Appeals has enounced and applied the novel, false, radical, dangerous and impossible doctrines that—

(R. 82, 83)) (*a*) On the trial of one or two joint receivers, on the charge that he has fraudulently converted the trust fund to his own use, and thereby embezzled the same, it is sufficient to convict him simply to show that they drew a joint check (R. 40) for a small part of the fund and he cashed it at bank (R. 54) and at once delivered the money to his co-receiver (R. 55).

(R. 83) (*b*) Such evidence casts the burden on the accused "to show that it [such delivery] was a mere irregularity without intent to do wrong", and, if he does not so show, the jury may well consider "the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund", though the trial court tells the jury the very contrary, and the statute requires a fraudulent conversion to his own use, not the use of another.

(R. 79, 80) (*c*) If one of two joint receivers permits the trust fund or any part thereof to go into the manual possession of his co-receiver for the sole purpose of *bona fide* investment by the latter in certain safe securities, and the said fund never came into the exclusive possesssion or control of the former, nevertheless he is *ipso facto* guilty of embezzlement thereof.

(R. 80) (*d*) One of two joint receivers cannot, even with the authority of his co-receiver (R. 30), act for both in any emergency or under any circumstances, in receiving (R. 40) or disbursing the trust fund or any part thereof, and if he does so act he is *ipso facto* guilty of embezzlement thereof.

If these doctrines be the law, then it must be true that it is *ipso facto* embezzlement for one to be appointed and to act as a chancery receiver. Except "for the purposes of this case", it cannot be seriously supposed that the appellate judge, under normal conditions, would declare any such principles to be the law. The courts below simply suspended the Constitution and laws "for the purposes of this case."

The opinion of the court below (R. 82) says the evidence of conversion is sufficient on this bill of exceptions. The record (R. 38-39) expressly shows that the money *was not* removed (R. 82) from the Trust Co. "into other banks"; that $10,070.82 of it was absolutely and finally allowed the accused, and ordered paid for costs, charges and commissions (R. 36); that they opened one account (R. 38) in the Trust Co. as receivers; that they afterwards (R. 38, 39) opened two others there as individuals; that some checks on the two were payable to the plaintiff in error. Was it embezzlement for them to open accounts in the same Trust Co. as individuals with their own money which the court had absolutely and finally awarded them by express orders, or to draw it out, whether by checks to Fields' order or any body else's? Not a two-hundredth part of the equity orders and papers were put in evidence in this case. Many, many orders

to pay out, or to invest, were made, as to which this record is silent, for they directed the accused's very acts which are held embezzlements in this case.

The opinion below is that if joint trustees draw money, which is placed in the manual possession of one, this is *per se* embezzlement by the one who lets go, without any further proof. Are joint trustees required to go about each holding to a corner of the trust fund or evidence of it? If he who lets go can prove (if given the chance) that the fund passed lawfully to the other for the sole purpose of *bona fide* investment by him, can he show no defense to a charge of embezzling that fund?

The opinion says (R. 77) that section 841, as to the act of embezzlement, " is necessarily prospective in its operation," and that it applies only "when embezzled thereafter". But here the court received evidence of 43 separate and distinct acts or items *before the code*, each as proof of a substantive offense, and no election was ever made by the prosecution, but was expressly denied (R. 41, Ex. 14) by the court, who charged (R. 68-70) the jury that they could convict of all—both the 43 before and the 49 after—if they would imagine a plan to embezzle, from no evidence thereof. "Fourteen of said certificates and seventeen of said checks and twelve of said withdrawals were prior to January 1, 1902" (R. 39), when the code took effect. "It is elementary that the admission of illegal evidence over objection necessitates reversal." *Waldron* v. *Waldron*, 156 U. S. 361, 380.

Since the court below has, to some extent, touched on the proof of conversion in its discussion (R. 78-80) of our motion for continuance, we have done the same; and, therefore, shall not repeat what we then said, as terminal facilities are necessary.

(*l*) It must not be forgotten that this is not the first or only case in which judges and juries and auditors of the Supreme Court of the District of Columbia, even in civil cases, *have been quick to convict both the living and the dead of gross frauds, on absolutely no evidence whatever;* nor in which the Court of Appeals of the District of Columbia has been swift to affirm such judgments; nor in which this court, in no uncertain terms, has reversed such judgments as, fortunately, could be reviewed here. Reference to the reversals of the dangerous decisions in the following cases is more than enough to cause pause before accepting the ruling of the courts be-

low that the evidence in this case is sufficient to destroy a man: *Baker* v. *Cummings*, 169 U. S. 189, 206 (8 App. D. C. 515). *Beyer* v. *LeFevre*, 186 U. S. 114, 119 (17 App. D. C. 238). *Darlington* v. *Turner*, 202 U. S. 195, 220 (24 App. D. C. 573, *per* Shepard, Ch. J.). It seems to be distressingly true that a mere charge of fraud is equivalent to certain conviction in the courts below.

XI. IMPROPER COMMENTS OF TRIAL JUDGE.

The bill of exceptions (R. 57, 58-59) recites the following remarkable occurrence in the presence of the jury, during the alleged trial of this case, just after the close of all of the evidence—a most crucial and critical point of the proceedings:

> "Thereupon the Government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the court would see from the drafts of the prayers handed up. The court then took a recess. After recess the following occurred: *The Court*: Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The court has examined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. *Mr. Baker*: We note an exception to the refusal of each prayer. We note an exception separately to the refusal to each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer. *The Court*: I overrule them. They are put together as a series, and as a series are refused. *Mr. Baker*: Then I offer prayer No. 1. But I suppose the Government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.
>
> "Thereupon the said prayers were handed to the clerk, and filed in open court endorsed by the court as follows: 'This series of instructions is refused as a series and ex. *Wright*.
>
> • • • • • • • • • • • •

"Thereupon the following occurred:

"*The Court*: I should perhaps make it clear right here and now, that it is a question which ought to be settled whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from 27 instructions up to an indefinite number. Some 27 prayers have been submitted here in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial but to save some possible point for reversal in another court. I started to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. *Mr. Baker*: If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having—*The Court*: You will not state that, either. What I say controls that. *Mr. Baker*: Then I note an exception to the court's ruling, and I ask to offer these prayers separately. *The Court*: I will not permit them to be offered separately in any form in which they are. *Mr. Baker*: Then I note an exception to the ruling of the court." (R. 58-59, Ex. 33).

(*a*) The opening clause expressly shows that our prayers were not offered at all, either singly, or as a series, or otherwise, and that the court was mistaken in so stating. This was tacitly admitted by the fact that the court subsequently *(but after all the harm had been done)* passed on our prayers separately (R. 57), four of which were abandoned on account of "the court's ruling on others" handed up.

It has been settled ever since this jurisdiction began that it is not appropriate for counsel to submit prayers in a series, and this is never done. We know full well the established law on this subject. The court directly charged us with trying to trap the trial tribunal through technical tactics, whereas we were acting in entire good faith and were astounded by the attitude assumed by the court. "Some 27 prayers have been submitted here in a series, *and in a manner that indicates that the purpose of the request is not to ascer-*

tain the opinion of this court on the law in respect to this trial, but to save some possible point for reversal in another court." Counsel said, "the prayers are not offered as a series", and tried to say that they were not offered for the purpose stated by the court, but was cut short by the judge with the curt and angry remark: "You will not state that, either. What I say controls that." We excepted and re-excepted, during this proceeding, to the court's rulings. The recess was for 45 minutes. It requires just *six minutes* to read the 27 prayers "handed up", and less than that to read those actually offered. None contains anything but pertinent principles of law of an elementary nature.

"To save some possible point for reversal in another court." *There could be no reversal without conviction,* in this case. This was an emphatic statement that the accused was guilty and would be convicted,—an open declaration to the jury, the counsel and the parties. It was emphasized by the granting of the Government's prayers (R. 57-58), for the reasons stated in our objections thereto. It was intensified by the following (R. 62):

> "The defendant then asked the following instruction: 'The jury are instructed that upon the evidence in this case, *they may find the defendant not guilty* on the two counts of the indictment, and they must find him not guilty on at least one of the counts. * * * The court refused this prayer; to which refusal the defendant duly reserved his Exception 42; and when refusing said prayer, the court, of its own motion then gave the jury the following instruction: 'The jury are instructed that upon the evidence in this case they cannot find the defendant guilty on both of the counts which are submitted to them.' (XX A)."

This, in the jury's presence, simply told them that they could not find the defendant not guilty on both counts, *but must find him guilty on one.*

We think there was grave and reversible error in the comments of the court above set out.

(*b*) A federal judge has no right, directly or indirectly, to charge a jury, or to tell them he thinks it is their duty, to return a verdict of guilty in a criminal case. If he expresses any opinion on the facts or the weight of the evidence, he must plainly tell the jury that

they are not bound by his opinion, but are themselves the sole judges of the facts and the weight of the evidence. The general rule is that it is error for the judge to comment on the weight or sufficiency of the evidence at any time during the trial, or to state expressly or by implication his belief as to the guilt of the defendant. 12 *Cyc.* 540, 596, *et seq.* It is error for him to make comments reflecting on the accused or his counsel *Allen* v. *U. S.*, 115 Fed. 3 (C. C. A.), in which, in a vigorous opinion, the conviction was reversed for such comments. *Mullen* v. *U. S.*, 106 Fed. 892 (C. C. A.), is strongly in point.

The comments of the court, in our case, contained a serious charge against both the accused and his counsel, which was erroneous. A trial judge has no right to use harsh language even to a witness when testifying, nor to comment on his testimony, when charging the jury, in such manner as to discredit him . *Ruppert* v. *Wolf*, 4 App. D. C. 556, 558. In the case just cited the judgment was reversed, regardless of other errors assigned, solely because of harsh comments of the trial judge reflecting on a witness, though the verdict was concededly right on the evidence, in the opinion of the appellate court. The court severely condemns any remarks of a trial judge, even a civil case, which may tend to prejudice the jury. *Hicks v.* U. S., 150 U. S. 442, 452, and *Starr* v. *U. S.*, 153 U. S. 614, 626, are quoted. Attention is called to the fact that the judge's lightest word is properly enough given great weight by the jury; that the policy of the law is defeated by hostile comments of the trial judge, whose duty it is to give reasonable force and effect to the law; and that "it is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling."

"To save some possible point for reversal in another court," and refusing to tell the jury that they might find the defendant not guilty on the two counts, are rather stronger than a trial judge's "lightest word or intimation" that alone "may prove controlling". *Hickory* vs. *U. S.*, 160 U. S. 408, 421.

These comments of the trial judge must necessarily have detracted very materially from the consideration which the jury should have given our granted prayers, if, indeed, they were not entirely destroyed by such comments; yet in *Burton* v. *United States*, 196

U. S. 283, this court held it error for the trial judge even to refer to the defendant's prayers as abstract propositions of law.

(*c*) The appellate judge concedes (R. 82) that the jury was present when the trial judge made the comments which we have quoted; and he says (R. 82) that they "may have been unnecessarily severe upon counsel, * * * but we find nothing therein calculated to influence the jury against the defendant." He also says (R. 81) that our exception to these comments "is of no consequence, because each of these [prayers] was thereafter submitted separately, and either *given* or refused."

He has utterly missed the points of our exceptions, which were (1) that these comments from the bench declared to the jury the guilt and certain conviction of the accused, (2) they seriously reflected upon the accused and his counsel, and (3) they necessarily weakened or destroyed the effect of our prayers *which were granted*. Obviously, they had no effect on our prayers which were refused, as the appellate judge seems to think. In the *Burton* case, *supra*, the court's comments related only to the defendant's prayers which were granted; and of these prayers the trial judge said (p. 304, bottom) that they—

> "are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law."

This court held (pp. 304-307) these comments to be reversible error, and the conviction was set aside. In the present case, the objectionable comments went far beyond those in the *Burton* case, and were far more prejudicial to the accused; yet the appellate judge finds "nothing therein calculated to influence the jury against the defendant." *Is not this statement incredible? Suppose the jury did find something therein calculated to influence them against the defendant?* Surely they did, if they were humans—and they were.

XII. GOOD CHARACTER.

The plaintiff in error did not testify in this case, because neither he nor his counsel were allowed any time to prepare for trial on the merits, or any necessary facilities or opportunities for such prepara-

tion. No evidence of the accused's character was offered. He alone could open the door for such evidence. He was not bound to do so, but might, if he saw fit, rely upon the legal presumption of his good character. This he saw fit to do, from the very necessity of the helpless position in which the trial court had unjustly placed him, and he therefore asked the following instruction (R. 63, Prayer XXV, Exception 44):

> "The jury are instructed in this case that the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in their consideration of the evidence."

The court refused this prayer, but the record is silent as to his reasons, which were (1) that there is no such presumption, and (2) that even if there is, the accused is not entitled to any instruction or charge on the subject in the absence of any evidence concerning his character.

The appellate judge (R. 83) attempts to justify the refusal of this prayer on two grounds, viz., (1) the prayer is too broad, and (2) the "court is not required to give an instruction on anything that has not been put in issue". For the purpose of the first reason, he assumes that the accused was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon. He evidently believes that there is no such presumption, if we mistake not his words.

In the first place, our prayer was not refused because it was too broad, nor on account of its language, but solely because of the principle declared; and in the second place, it was not too broad. The elements of good character are uprightness, honesty and integrity, as is clearly shown in detail in March Thesaurus Dictionary pp. 148, 508, 896, 1123-1125 (1906). By what reason can a prayer on good character be made bad because it defines the subject-matter by stating its constituent elements? Indeed the terms used, "an upright, honest man of integrity", are mere synonyms of good character.

Even if our prayer was too broad, yet if it was sound in substance, or if it be assumed that we were entitled to an instruction on the subject, then "*it was error in the court to refuse it without giving an appropriate instructions on the subject* to which it relates." *Texas*

& *P. Ry. Co.* v. *White*, 101 Fed. Rep. (C. C. A.) 928, 932, and cases therein cited. Here the trial judge refused absolutely to say one word to the jury on the subject of the presumption of good character to which our prayer related. It would be just as reasonable to refuse to charge the jury as to the presumption of innocence or the burden of proof or the reasonable doubt, if the accused's requests on these subjects happened to be too broad.

The appellate judge's second reason is inconsistent with the existence of a presumption of good character, for if it does exist the court must advise the jury of it, on request of the accused; *otherwise it is of no avail to him.* The appellate judge holds (R. 83) flatly that the trial court was not required to instruct on good character, because there was no proof concerning it, and adds (R. 83):

> "All that the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the Government to overcome that presumption by proof of guilt beyond a reasonable doubt."

To support his ruling (R. 83) he cites "*State* v. *Anslinger*, 171 Mo. 489, 415; *State* v. *Gartrell*, 171 Mo. 600, 606; and *Williams* v. *People*, 166 Ill. 132, 136." He has transposed the Missouri cases in his text citations, and "415" is also wrong. Both the *Gartrell* and *Anslinger* cases were decided on the same day, and by the same division of the court. The former was an aggravated case of murder, and the judgment was affirmed, but the latter was reversed.

The Missouri and Illinois cases cited hold in effect that no presumption of good character exists in those States, and the court need not therefore charge on the subject unless the defendant has given proof. The Missouri cases were decided *under a statute* which required the court to include in its instructions "whenever necessary", one on the subject of the defendant's good character; and in the *Anslinger* case the court held that *this statute* did not require such an instruction where no evidence of good character was offered; and, further, that the testimony of good character offered in that case did not relate to the trait of character which was in issue, and that there was no testimony which, *under the statute*, made it necessary for the court to instruct the jury (pp. 608, 609) on this subject. The question of the existence of a legal presumption of good character in the absence of a statute was not even incidentally involved or considered.

The charge was election frauds (as in *Mullen's* case *infra*) but the character testimony (p. 608) related only to defendant's reputation as "a hard-working, industrious man", while the trait involved, said the court (p. 609), "was that of an honest and law-abiding citizen." The *Gartrell* case passively follows *Anslinger's*, and all said on this subject is (pp. 519-520): "As to failure to instruct on good character, there was no proof that defendant was of good character, and the statute does not require" such an instruction without such proof. The Missouri court also cites to this point *State* v. *Hopper*, 71 Mo. 430, where this question was not considered at all, but which merely decided (p. 431) that the court was not bound to instruct as to murder in the second degree when there was no evidence to warrant such an instruction. None of the Missouri cases cite any from other jurisdictions to support their rulings as to character, but only the statute and local cases. The prayers asked are not given in any instance.

In *William's* case, 166 Ill. 132, the charge was assault with intent to steal. The character prayer asked is not given. The court simply held that the trial judge was not required to instruct the jury on the question of defendant's character "as there was no evidence whatever on that question before the jury" (p. 136). Prior cases in that State had held the same rule in general, and no others were cited to this point.

The appellate judge then concludes (R. 83) this subject as follows:

> "The authorities relied on by the defendant do not go so far as to hold that the accused is entitled to such a charge as was asked, under all circumstances. *McKnight* v. *U. S.*, 97 Fed. Rep. [208] 210; *Mullen* v. *U. S.*, 106 Fed. Rep. 892. In the first of those cases the judgment was reversed because the court permitted the District Attorney, over the objection of the defendant, to comment upon his failure to prove a good character; and in the second, the court, in refusing the instruction, made remarks decidedly prejudicial to the defendant, respecting his failure to offer similar proof."

The *Mullen* case has been misread. The defendants were indicted for election frauds; they offered no proof of character, but asked the court to instruct the jury:

> "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused, in considering the guilt or innocence of them, or any of them."

This prayer was refused, and this was the principal question on appeal, not the court's comments, which were of secondary importance, and of none at all if the refusal was right. The case was decided in 1901. The opinion, which fully decides the principal point, was written by *Mr. Justice Day*, and was concured in by *JJ. Severens* and *Lurton*, who held:

> "In a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed."

The court said (p. 894):

> "Does such a presumption exist? We fail to find any difference of opinion in the well recognized text writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the alleged commission of the offense. It is true the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he sees fit, rest upon this presumption raised by the law."

The court quotes to these points 1 *Bish. New Cr. Pro.* (4th Ed.) section 1112, par. 2; *Underhill Cr. Ev.*, section 76; *Coffin* vs. *United States*, 158 U. S. 432, 460, and cites *McKnight, United States*, 97 Fed. Rep. (C. C. A.) 208, 210.

There are certain unmistakable signs in the opinion of the appellate judge (R. 83) which indicate quite clearly that he never read either the *Mullen* or *McKnight* case.

Recurring to the doctrine of a few isolated decisions, the court further said in the *Mullen* case (p. 894):

> "It is true that there are cases which hold that, where there is no testimony on the subject [of char-

> acter], the court is not obliged to say anything to the jury, either one way or the other. But if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

The emphatic and correct declaration of the government counsel in the court below was this (*Brief for U. S. p.* 35):

> "Unquestionably it is the law that in the absence of any testimony concerning the character of a defendant, the law presumes him to be a man of good character."

In *McKnight* v. *U. S.*, 97 Fed. Rep. 208, 211 (1899 C. C. A.), the law concerning the presumption of good character is carefully considered at some length, and the leading cases are cited. The prosecution was for embezzlement. *Mr. Justice Day* wrote the opinion, in which *JJ. Taft* and *Lurton* concurred.

In 12 *Cyc.* 412 the cases concerning good character are collected, and the author says:

> "The accused is not compelled to rely altogether upon the presumption of his good character, but must be permitted to introduce affirmative evidence thereof", if he sees fit.

The great weight and importance of evidence of good character were expounded by this court in *Edgington* v. *U. S.*, 164 U. S. 361, 366; but the exact point now presented does not appear to have been passed on by this court. The *Edgington* case, like this, involved a charge of *crimen falsi* or species thereof, namely, making a false deposition in aid of a claim for a pension.

In *Posey* v. *U. S.*, 26 App. D. C. 302 (January, 1906), the court expressly recognized the existence of the presumption of the good character of the accused in a prosecution for arson, and said (p. 307):

> "Notwithstanding the general presumption of innocence and previous good character, a defendant has the right to offer evidence of his general good character if he thinks it of importance."

In *U. S.* v. *Neverson*, 1 Mackey 153, 158, three defendants were charged with murder, two of whom gave no evidence as to their characters, and at their request the following instruction was given and approved on appeal:

> "As to the presumption of good character, the prisoners are entitled to the presumption of having sustained good characters up to the time of the alleged murder, and this presumption remains in their favor unless the jury shall believe from the evidence that they in fact were not entitled to such reputation."

In the case at bar, the character prayer is not so strong as that in the *Mullen* case, for there it was held that the jury should have been told that not only this presumption exists, but also that it "is to be considered as evidence in favor of the accused." The words of our prayer, "bound to assume", meant that the jury were bound to recognize and give proper effect to this presumption.

The same phrase, *"bound to assume"*, was used in our prayer as to the presumption of innocence (R. 62, Prayer XVI) which the court granted, and it had nothing whatever to do with the refusal of the character prayer, though the appellate judge (R. 83) thinks it did.

On a charge of *crimen falsi*, the defendant's character for honesty, uprightness and integrity is as certainly involved as his innocence, whether he offers proof of it or not. The very same reason that presumes innocence presumes good character, as said in *Mullen's* case (p. 894). The logical result of the opinion here is to destroy utterly the presumption of innocence, and the right to an instruction on it.

The opinion of the appellate judge repudiates the existence of the presumption and the right to a charge on it, as declared in the *Mullen* case, and by other courts in criminal cases, and adopts as the law the irrational and unsupported principles which he declares. His conclusion is too far-reaching, radical and dangerous, to be passed without the final consideration of this court.

Before this character prayed was refused, the presiding judge had already reflected on the accused by having charged (R. 58) that he had submitted his prayers *"in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial, but to save some possible point for reversal in another court."* We have shown that this was error. Conceiving, perhaps, that the refusal of our character prayer gave them a license to assail the accused's character by arguments, the prosecutors made direct assaults on his character in their arguments to the jury (R. 63-65). It is unnecessary to repeat their language here, except to say that it went so far as to state (R. 65) that he *"did not even try to prove a good reputation."* In *McKnight v. U. S.*, 97 Fed. (C. C. A.) 208, 209, the conviction was reversed because the trial court permitted the prosecutor to comment on the defendant's failure to produce evidence of his character. In our case, the court recognized that the accused "did not have to" prove a good reputation (R. 65), yet refused to tell the jury so. By all the authorities, the prosecutor has no more right to assail the defendant's character by argument than by evidence, when the accused has not put it in issue. As the prosecutors' arguments to the jury (R. 63-65) in this case constituted gross misconduct, both for this reason and because they charged the accused with other offenses, the subject is more fully considered elsewhere. The cases which we have cited *supra* say that the law presumes the defendant's good character, and that he may elect to stand on that presumption; in which event the prosecution cannot assail his character by evidence, argument, comment, question, or insinuation—in short, neither by word nor act.

The charge (R. 65-70) is wholly silent as to the law of character. The cases show that a prosecutor's gratuitous assault on the character of the defendant, which he has not put in issue, is none the less reversible error because he withdraws it under pressure (R.63-65), for the weapon's withdrawal does not heal the wound.

From the proceedings in this case, it is impossible for the jury to have escaped the conclusion that *they were bound to assume that the accused was of bad character*—an assumption at war with both the law and the fact, and intensely prejudicial to the accused. The same effect was produced in the *McKnight* case, *supra*, by the comments of the Government's special counsel in his argument to the

jury concerning the failure of the accused to call witnesses to prove his good character, which comments the court refused to check (pp. 209-210). Both the court and counsel, however, expressly declared (p. 210) to the jury that the law presumes the good character of the accused. The conviction was reversed for allowing such suggestion of counsel, the appellate court concluding (p. 211):

> "Where no testimony is offered, the accused can rest upon the legal presumption of good character. * * * The suggestion of counsel, thus approved by the court, may be more detrimental to the rights of the accused than any testimony that could be adduced against him. In effect, it not only destroys the presumption in his favor, but permits an inference that his character is bad because he has not adduced proof to the contrary. * * * Sound principle, as well as the weight of authority, concur in holding such comments, approved by the court, to constitute such substantial error as requires a reversal and new trial."

XIII. MISCONDUCT OF PROSECUTORS.

The indictment (R. 1-2) in form charges the accused with the offense of embezzlement of a certain single sum of money on a certain day, but no evidence whatever was offered to prove this charge as laid, and the record so recites (R. 40) in terms. In their arguments to the jury, *based upon no evidence whatever*, and over the objections and exceptions of the accused, the then prosecutor and his then assistant expressly charged (R. 63-65) the accused with (1) being "a common thief", (2) depositing these trust funds to his private bank account, (3) "forgery", (4) "treating people as a physician", (5) "trying to break into" the medical profession, (6) maltreating his clients as a lawyer, and (7) stealing dead men's money from widows and wards. Not content with this vitriolic vituperation they further charged him with (8) posing under an assumed name, (9) being a fugitive from justice, (10) not even trying "to prove a good reputation", (11) being a lawyer, and (12) conducting his own defense.

In addition, the said assistant, during his argument, showed the

jury (R. 64) all of the endorsements on the checks against account 35191, which endorsements (except only those of the accused) the court had ruled out (R. 41, top). Each check (R. 64) was "handed separately to the jury, and they examined both sides thereof", over the objection and exception of the accused.

(1) There was nothing to excuse the charge (R. 63) that the accused was "a common thief". To be such is a substantive offense of itself. *World v. State*, 50 Md. 49, 54. This charge, therefore, was that the accused was guilty of an offense distinct and independent from that for which he was supposed to be on trial. There was nothing to warrant the assertion (R. 64) that the accused had deposited these trust funds to his private account, or that Eckloff's testimony (R. 40) meant any such thing, for it related only to a statement of the accused concerning his endorsement of Lipscomb's name on the certificate of Nov. 8, 1901. There was nothing to justify the charge (R. 64) of forgery by Fields of Lipscomb's name on the certificate just mentioned, but the proof (R. 40) conclusively showed that there was no forgery. There was nothing to support the assertion (R. 64, bottom) that the accused was "treating people as a physician", and the testimony (R. 48) of Tyser, upon which the said assistant perhaps based this statement, lends no support to it, even if true (which it is not), for one who answers once to the title of "Doctor" is not necessarily engaged in "treating people as a physician", or "trying to break into another honorable profession", as charged (R. 64). There are more kinds of doctors than this young assistant ever dreamed of. There was nothing to warrant the charge (R. 64) that as a lawyer the accused had maltreated his clients. There was nothing to justify the assertion (R. 65) that he had stolen dead men's money from widows and wards. There was not a word of evidence concerning dead men's money or widows and wards or stealing from them or anyone else. There was nothing to support the charge (R. 64) that the accused was a fugitive from justice, and detective Tyser's testimony (R. 48), upon which this statement was supposedly based, does not justify it. The charge (R. 64) that the accused was posing under an assumed name rests only upon the bare and uncorroborated statement of detective Tyser (R. 48) that the accused, on one occasion only, answered to such a name. The charge (R. 65) that the accused "did not even try to prove a good reputation", was inexcusable from any view-point. Equally so was

the harping (R. 65) on the fact that the accused was a lawyer, whose "counsel have day after day stood in this court like phonographs, the passive mouth-pieces of the defendant, who has conducted his own defense."

These arguments were direct appeals to the passions and prejudices of the jury, they were direct attacks on the character of the accused concerning which no testimony had been given, they were reflections on his failure to testify, they were utterly unwarranted and inexcusable, they were highly improper and intensely prejudicial, they were deliberate and intentional, and they were made and meant to convict at any cost. A comparison of these violent and irrational arguments with the rest of the record will show how wild and unfair they were. Many of these intolerable statements directly charged the accused with guilt of grave crimes other than that alleged in the indictment.

In *Waldron* v. *Waldron*, 156 U. S. 361, the court said (p. 380):

> "It is elementary that * * * the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor [reversal]."

In *U. S.* v. *Williams*, 168 U. S. 382, the accused was indicted for extortion as an inspector of Chinese. The prosecutor said: "No doubt, every Chinese woman who did not pay Williams was sent back". This court said (p. 398):

> "The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the right of the accused to a fair and impartial trial for the particular offense charged."

In *Hall* v. *U. S.*, 150 U. S. 76, the accused was indicted for murder. The prosecuting attorney argued to the jury that the defendant had committed another murder in another State. This court said (pp. 80, 81, 82):

> "If the defendant had murdered the negro in Mississippi, and had been convicted therefor, evidence,

either of the murder or conviction, would have been incompetent to support the indictment against him for the murder of Yates in Arkansas. *Boyd* v. *United States,* 124 U. S. 450, 458. * * * .

"The attempt of the prosecuting officer of the United States in induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it no weight.

"The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. *Wilson* v. *United States,* 149 U. S. 60, 67, 68."

The following cases are directly in point: *Long* v. *State,* 81 Miss. 448, 453. *People* v. *Derbert,* 138 Cal. 467, 470. *Taylor* v. *State,* 27 Tex. App. 463, 465. *State* v. *Irwin,* 9 Idaho 35, 38. *People* v. *Montgomery,* 176 N. Y. 219, 230. *Tijerina* v. *State,* 45 Tex. Cr. Rep. 182, 183. *McDonald* v. *People,* 126 Ill. 150, 153. *Flint* v. *Com.,* 81 Ky. 186, 187. *State* vs *Shepard,* 49 W. Va. 582, 589. *Cargill* v. *State,* 12 Ky. Law Rep. 149, 151. *State* v. *Kirby,* 62 Kan. 436, 443. *State* v. *Reilly,* 4 Mo. App. 392, 394.

In 12 *Cye.* 571-578 the cases are collated to the point that it is error for the prosecutor to assert, in argument to the jury, facts and circumstances of which there is no evidence.

It is just as prejudicial error to ask questions, make charges, statements, insinuations, comments or arguments, for the purpose of creating the impression on the jury that the defendant has been guilty of other offenses, as to give inadmissible evidence of them to the jury; and likewise to assail the defendant's character when he has not put it in issue. The injury is so vital and permanent that even *the court's rebuke is not sufficient to cure the error. Boyd* v. *U. S.,* 142 U. S. 450, 458. *People* v. *Derbert,* 138 Cal. 467, 470. *Car-*

gill v. *State*, 12 Ky. L. Rep. 149, 150. *People* v. *Jacks*, 76 Mich. 218, 221. *Welhousen* v. *State*, 30 Tex. App. 623, 626. *Wolfson* v. *U. S.*, 102 Fed. 134, 137. (C. C. A.). *Tijerina* v. *State*, 45 Tex. Cr. Rep. 182 (bottom). In *Hopt.* v. *Utah*, 120 U. S. 430, the court said (p.438):

> "There may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error."

(2) The assistant prosecutor's assertion (R. 65) that the accused "did not even try to prove a good reputation", was grave error. *McKnight* v. *U. S.*, 97 Fed. Rep. (C. C. A.) 208, 209. *Mullen* v. *U. S.*, 106 Fed. Rep. 892, 894. *Allen* v. *U. S.*, 115 Fed. Rep. (C. C. A.) 3, 12.

On objection, the trial judge (R. 65) said that the defendant "did not have to" prove a good reputation, and mildly suggested "that the remark ought to be withdrawn"; and counsel then withdrew it. In *Wilson* v. *U. S.*, 149 U. S. 60, 67, a similar reflection was made on the accused's failure to testify, but was immediately withdrawn on his objection and the court's mild suggestion; nevertheless this court held it fatal error, quoting (p. 69) from *Com.* v. *Scott*, 123 Mass. 239, 240, 241, and *Austin* v. *People*, 102 Ill. 261, 264. The case of *Barnard* v. *State*, 86 S. W. Rep. 760, 761 (Tex. Cr. App. 1905), is directly to the same effect. See also *State* v. *Taylor*, 57 W. Va. 228, 234.

It was the immediate and imperative duty of the trial judge, as pointed out in *Wilson's* case (p. 67), "to express to the jury in emphatic terms that they should not attach to the failure any importance whatever"; but he said not one word to them to this effect.

By its terms, the federal evidence act involved in *Wilson's* case, applies to the District of Columbia, and it is excepted from the repeal provisions of the Code D. C. by section 1640 thereof.

In *Waldron* v. *Waldron*, 156 U. S. 361, the trial court ruled against counsel's argument of a certain inference which had been excluded (pp. 364, 367), and by the general charge told the jury to disregard the inference sought to be drawn by counsel (p. 368); yet this court, quoting (p. 383) from *Hopt* v. *Utah*, 120 U. S. 430, 438,

to this point, held the improper argument reversible error, as it was not cured (pp. 382-383) even by the rulings and charge.

On objection sustained (R. 65), the assistant prosecutor also withdrew his statement (R. 65) following:

> "And you have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense."

It is not uncommon, but most reprehensible, for counsel to make statements to, or in the presence of the jury, which they well know are improper and prejudicial, with the expectation of being compelled to withdraw them, after they have done the intended harm. It is an imputation on ordinary intelligence to state, and it is quite impossible to believe, that the prosecutors in this case did not know the gross impropriety of at least some of their assertions to the jury; and both they and the court certainly knew that the accused was entitled to a fair and impartial trial, to the assistance of counsel, to compulsory process for his witnesses, and to be informed of the nature and cause of the accusation against him; yet he was deprived of all of these constitutional rights in this case, and then blamed for such deprivation.

In *Ex. p. Lange*, 18. Wall. 163, this court said (p. 178):

> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

In *Allen* v. *U. S.*, 115 Fed. Rep. 3 (C. C. A.), the court said (p. 12):

> "All men stand equal before the law, and have the same constitutional rights and privileges. The high and the low, the poor and the rich, the criminal and the law-abiding, when indicted are entitled, under the law, to a fair and impartial trial. This is a sacred boon guaranteed to every person, and of which no one should ever be deprived. The law, in its extended reach,

> power, and influence, is as tender of the rights of the man who is supposed to be bad as it is of the liberties and rights of the man who is believed to be good."

It is indeed idle to say that the injury which these confessedly improper remarks caused the accused, was eliminated by their formal withdrawal under objection and judicial suggestion. As well can the trial judge obliterate from the minds of the jurors, by his mere statement, or the wave or brush of his hand, the stains of an upset well of ink on a juryman's shirt front. *The harm was done, and there it remained.* The cases which we have cited, both civil and criminal, show that the withdrawal of these two prejudicial assertions did not cure the error. No others were withdrawn.

In *Waldron* v. *Waldron,* 156 U. S. 361, in speaking of the improper argument of counsel, which was attempted to be corrected by the trial judge, this court said (p. 383):

> "There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. * * *
>
> "The case here, we think, comes within the exception."

(3) The assistant attorney's conduct (R. 64) in showing the jury the ruled-out (R. 41) endorsements on the checks against account 35191, was improper, for in this way he got before them matters that were not in evidence in the case. A somewhat similar question arose in *Waldron* v. *Waldron,* 156 U. S. 361, concerning counsel's argument from certain papers which had been offered in evidence for "the general purposes of the cause", but had been rejected for such purposes, just as all endorsements on the checks mentioned (except of the accused) had been ruled out; and this court said (p. 382):

> "The question * * * is * * * whether, having been rejected for such purposes, it was competent for the plaintiff to use them in direct violation of the restriction placed upon their use. If

> error was committed in restricting the use of the evidence, the plaintiff's remedy was to except thereto, and not to disregard the ruling of the court and use the evidence in violation of the conditions under which its admission was secured."

Section 935 Code D. C. gives the United States the same right of appeal in all criminal prosecutions that is given the accused, "including the right to a bill of exceptions".

In view of his prior ruling rejecting all endorsements on the said checks, excepting of the accused, we are at loss to account for the trial judge's overruling of our objection to the assistant prosecutor's exhibition to the jury of these checks and excluded endorsements. They were most certainly inadmissible for the reason (R. 41, top) of their rejection—because they were absolutely unproved.

(4) The court below says (R. 83) that the arguments of the prosecutors "contain much invective against the defendant"; that "he was denounced as a common thief, and as one who had robbed the widow and orphan"—and then adds parenthetically, but without the slightest support of the record—"(who were among those claiming participation in the final distribution of the funds as preferred creditors of the Endowment Association)". Where are "the widow and orphan" in this record? It was their very absence that in part caused our objection to the prosecutor's reference (R. 65, bottom) to them. The court cites (R. 84) *State* v. *Gartrell*, 171 Mo. 489, 512, to support its conclusion that the foregoing remarks "do not amount to reversible error". The case is one of those previously cited (R. 83) by the court below concerning the law of good character; but in it the court held (p. 512) that the objectionable remarks were fully supported by the proof and confined strictly to the charge of the indictment; and said further (p. 512) that to the remarks of counsel—

> "no objection whatever was made, and no exception saved; * * * as no objection was made it is of course not before us for review".

Every remark of which we complain was promptly objected to and exception was saved (R. 63-64, Ex. 47; R. 64, Ex. 48; R. 64, Ex. 49; R. 64, Ex. 50; R. 64, Ex. 51; R. 65, Ex. 52; R. 65, Ex. 54).

These improper arguments were also specifically made a material part (R. 21, par 7) of our motion for new trial.

The court below says (R. 83) of the *Gartrell* case that it "is well considered, and the very point here made is ably discussed and, we think, properly decided." In view of the statements of that court and the language above quoted from that case itself in its reference to the objectionable remarks of the prosecutor, we have some difficulty in perceiving its authority and application here, and a critical reading of it only increases this difficulty. The cases decided by this court are controlling.

The court below then says (R. 84) that "when counsel went outside of the case to say that 'defendant did not even try to prove a good reputation', the court promptly intervened saying that he did not have to, and that the remark should be withdrawn." The court did not intervene promptly nor at all until the accused objected (R. 65) to the remark, and then the objection was not even sustained, but the court merely made the mild suggestion that "the remark ought to be withdrawn."

The court below further says (R. 84) that "counsel then immediately withdrew the remark. No further action was asked of the court, and this is all that he could well have done under the circumstances"; to which he cites *Lorenz* v. *U. S.*, 24 App. D. C. 337, 391, and *Yeager* v. *U. S.*, 16 App. D. C. 356, 362.

But it is wholly unnecessary for the accused to ask any further action of the trial judge, and it was very far from being "all that he could well have done under the circumstances", as emphatically pointed out in *Hall's* case (p. 81) and *Wilson's* case (p. 67); for his duty called for immediate and strong action, but was met with mere inaction. We believe that the withdrawal of this and the one other statement did not cure the error, even if this had been a purely civil cause. A trial judge owes not merely a passive but an active duty to the accused, and it is not necessary that he must object or make requests in every instance in order to get the judge to act in his behalf, at the peril of his life or liberty.

Simple comparison of the improper arguments in this case with those in the *Lorenz* and *Yeager* cases, is sufficient to show that they have nothing in common, but indeed are quite alien.

In the *Yeager* case, no exception was taken to the prosecutor's statement, but the court directed the jury to disregard the state-

ment, and not to consider counsel's remark. In the *Lorenz* case, the court interrupted counsel of its own motion; no exception was saved, and the incident was not mentioned in the motion for new trial. The court said (p. 391):

> "Had the court, instead of interrupting counsel, permitted him to continue this line of argument, the judgment would have to be reversed."

The court below does not cite *Capital Construction Co.* v. *Holtzman*, 27 App. D. C. 125. In that case, it is held that when incompetent evidence is admitted, the error is not cured by an instruction to the jury to disregard it, the court saying (pp. 132-133):

> "Even if the jury had been told to disregard the testimony, and it had been stricken from the record, the error would not have been cured."

It is further held that when incompetent evidence is admitted over objection, and when commented on by counsel who adduced it, in addressing the jury, such comment is objected and excepted to, and counsel offers to withdraw it if objected to, but it is not withdrawn and the jury is not instructed to disregard it, such error is committed as to justify reversal, especially where it appears that the action of counsel in making such comment is specifically set forth as one of the grounds of a motion for a new trial, because (p. 139) "the evil had been done". Of the *Yeager* case the court said (p. 139):

> "In the *Yeager* case the court directed the jury to disregard the statement and directed them not to consider counsel's remark. Furthermore there was no exception taken in that case."

Of the *Lorenz* case, in which the trial judge interrupted counsel, the court said (p. 139):

> "We said had he not done so, and had he permitted him to continue the line of argument objected to, the judgment would have had to be reversed. It further appeared that the incident was not mentioned in any of the grounds set up in the motion for new trial."

Recurring to the case then under consideration, the court concluded (p. 139):

> "Here the action of counsel for plaintiff in making the statement is specifically set out as one of the grounds upon which the motion for new trial was founded. We conclude the assignment of error based upon the remark of counsel, and the proceedings following it, is well founded."

The court below has thus itself in part distinguished the instant case from those of *Lorenz* and *Yeager*, and brought it within the principle of the *Waldron* and other cases in this court, and of the *Holtzman* case in the court below, in which (p. 139) the *Waldron* case was cited and followed.

(5) The most improper and prejudicial remarks made by counsel for the Government in the case at bar were not only not withdrawn, nor offered to be withdrawn, but our objections to them were overruled, and exceptions were duly reserved. Of no less than twelve intensely objectionable statements to the jury, the court below mentions but two which were excepted to, and but one which was withdrawn, and remains inexplicably silent as to those which charge the accused with (*a*) depositing these trust funds to his private bank account, (*b*) "forgery", (*c*) "treating people as a physician", (*d*) "trying to break into" the medical profession, (*e*) maltreating his clients as a lawyer, (*f*) posing under an assumed name, (*g*) being a fugitive from justice, (*h*) being a lawyer, and (*i*) conducting his own defense. *Was there no prejudicial error in these arguments of the prosecutors to the jury.* Why does the court below ignore them?

We have already referred to the conduct of the prosecutor in stating to the trial court that the original certificate of incorporation had been lost, etc., when he had the paper purporting to be the original in his own possession at the time he made the statement, and knew it, or should have known it. (R. 42, bottom; R. 21, Pars. 6, 7; R. 22-23, affidavit of Fields; R. 23, affidavit of Walker; R. 24, affidavit of Baker; R. 25-26, affidavit of Smith).

The trial judge in this case said not one word to the jury to disregard the remarks that were withdrawn, and he put the stamp of his approval upon all of those which were not withdrawn and to which we objected and excepted.

In view of the prosecution's evidence and arguments in this case, *of what has the accused been convicted?*

In *Allen* v. *U. S.*, 115 Fed. Rep. 3 (C. C. A.) the court said (pp. 12, 11):

> "The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with the power and charged with the duty of administering the law in such a manner as to reach the ends of justice and right. • • • We have had occasion altogether too often to condemn the failure of justice brought about by the reckless conduct of officers, whose sworn duty it is to conduct prosecutions legally, and in conformity with settled principles. • • • Nothing can bring more contempt and suspicion on the administration of justice than the failure of its ministers to respect justice."

XIV. BILL OF EXCEPTIONS.

The bill of exceptions in this case is framed in strict accordance with the requirements of Code D. C. section 73, and of Rule V, sections 4 and 5, of the court below, and of the controlling decisions; and it is conclusive on this writ of error. *Kelly* v. *Moore*, 22 App. D. C. 1, 6. It contains, and must be taken to contain, the substance of all of the evidence and proceedings in the case having relation to or in any wise connected with our exceptions, as the same are therein set forth, although there is no recital of this fact in so many words. In *Byrne* v. *Morrison*, 25 App. D. C. 72, 76, the court said, "be that as it may, we must accept the bill of exceptions, which cannot be corrected"; and in *Talty* v. *D. C.*, 20 App. D. C.. 489, 491, the court said that "every reasonable presumption will be indulged in favor of the regularity of a bill of exceptions that the record will permit."

The exceptions in this bill appear in unbroken numerical sequence from the first to the last, and the substance of all of the evidence and proceedings is recited chronologically in the order of its introduction and their occurrence. The frame of the bill not only excludes the probability but also the possibility of other evidence.

This bill of exceptions opens with several preliminary motions and the rulings thereon (R. 28-29). Then it recites the arraignment and plea (R. 29): then another motion and its denial (R. 29); then the empanelling and swearing of the jury (R. 29); that the U. S. Attorney opened to the jury, but the defendant made no opening at any time (R. 30). The bill then proceeds as follows: "In order to maintain the issue on its part joined, the United States then offers as a witness Samuel McComas Hawken, who, being first duly sworn, testifies", etc. (R. 30). This is followed by many (17) pages of oral and documentary evidence with this witness on the stand. Then follows the testimony of various other witnesses for the United States, including Young, Parker. Eckloff, Pinchback, Schayer, Donaldson, Tyser, Robinson and Padgett, that of each being preceded by a statement in form similar to this:

"The United States then offered as a witness in its behalf Dr. Young, Secretary of the Franklin Fire Insurance Company, who, having been duly sworn", testified as then recited (R. 37). At the close of the testimony of the last Government witness named (Padgett, R. 53) is this statement (R. 53): "At this point the U. S. Attorney, Mr. Beach said: 'The Government rests, if it please the court.'" The bill then recites (R. 54) that "thereupon the defendant moved the court to strike out all the evidence offered by the Government tending to prove by secondary evidence the existence of a charter of the Washington Beneficial Endowment Association, because" of certain reasons stated, "but the court overruled the motion; to which ruling the defendant duly reserved his Exception 28." The bill then (R. 54) proceeds: "The defendant then called John Joy Edson as his witness, who, having been duly sworn, testified," etc. This is followed by Edson's testimony (R. 54) and that of two other witnesses, Mead (R. 54-55) and Wall (R. 56). Then occurs this recital (R. 56): "The foregoing is the substance of all the evidence offered by the defendant, who thereupon rested. The Government then announced that it had *no further* evidence to offer." Then follows a motion (R. 56) by defendant to discharge the jury, which motion was denied. The prayers of the respective parties were then handed up (R. 57). The bill then recites (R. 59) that "the defendant then moved the court to instruct the jury on all of the evidence in the case to return a verdict of not guilty, because," etc. This is followed by five specific prayers (Defendant's Prayers, I-V,

R. 59), each of which is based on "all the evidence in the case," for a verdict of not guilty, two of which (II and III) were granted and the others refused and exceptions reserved. Almost all of the defendant's other prayers (R. 59-63) were more or less founded in effect on all the evidence in the case; and the arguments (R. 63-65) and charge (R. 65-70) were likewise supposed to be so founded.

These motions and prayers founded on "all the evidence in the case" are not only worthless but also senseless, unless this bill contains the substance of all the evidence; and otherwise they would not be here at all.

That this bill will be taken to contain all the evidence in the case, for the purposes of this writ of error, has been so finally settled by this court on bills much less conclusive than ours, that we need only refer to the latest opinions, and ask a comparison of our bill with the bills in those cases. In *Clyatt* v. *U. S.*, 197 U. S. 207, 220, the defendant was indicted and convicted for returning certain negroes to a state of peonage, in violation of the federal statutes made in pursuance of the Thirteenth Amendment. The bill of exceptions embodied no affirmative statement that it contained all the testimony; and this omission was considered at length and held not to be fatal; but, on the contrary, the court held, on an inspection of the bill, that it must be taken as containing all the evidence, especially as it was a criminal case; and, on this view, reversed the conviction for a plain error not assigned in the trial court nor made the subject of any exception. The court reviewed fully the prior case of *Gunnison Co.* v. *Rollins*, 173 U. S. 255, 261 (bottom).

"In the absence of a positive statute or a rule of court to the contrary, a recital or certificate need not state in express terms that all the evidence is set out. It is sufficient if it affirmatively appears from a reasonable construction of the language used that all the material evidence is preserved." 3 *Cyc.* 168. If an instruction is given which is erroneous under any conceivable state of facts, it may be reviewed, though the evidence is not set out. *Frost* v. *Grizzly*, 102 Cal. 525, 527. Where a ruling of the trial court is erroneous on the evidence set out, regardless of what other evidence might have been introduced, it is of no consequence that the record does not purport to state all the evidence. *McKissock* v. *Witz*, 120 Ala. 412, 417.

"We may assume that the record contains the substance of all the testimony given in the case, although it does not in terms purport to do so." *McCaully* v. *U. S.*, 25 App. D. C. 404, 409, citing *Gunnison Co.* v. *Rollins*, 173 U. S. 255, 261. "A preliminary question has been raised here by the appellee, on whose behalf it is contended that the record does not purport to contain the whole testimony in the case, or the substance of it. * * * Of course, testimony not bearing upon the rulings—as, for example, medical testimony as to the nature and extent of plaintiff's injuries—need not be given. But although the record in the present case is not free from just criticism in this regard, yet we think, in view of its general tenor, that it should be accepted as sufficient. It states, after the detail of the testimony of witnesses on both sides, that 'counsel for both plaintiff and defendant announced that they had no further testimony to offer, and rested their case.'" *Klopfer* v. *D. C.*, 25 App. D. C. 41, 43, 44.

> "In our opinion the bill of exceptions in this case substantially complies with that requirement. It purports to recite the evidence in the order of its introduction, giving the name of each witness. This evidence is given at length in each instance, and frequently recites both the questions and answers." *Rockwell* v. *Capital Traction Co.*, 25 App. D. C. 98, 110, 111.

In the trial court it was stipulated in writing by the then counsel for the Government that this bill contains the substance of all the evidence in the case having relation to or in any wise connected with our exceptions; but it was asserted in the court below by counsel for the Government (*Brief for U. S.*, pp. 4-6) that it cannot be so taken, owing to the want of a recital to that effect; and because the court charged (R. 68) on certain letters not recited in the bill; and because the identified report (R. 37) of Nov. 23, 1903, was not recited in the bill as having been put in evidence.

The opinion of the court below (R. 82) is that the bill does not contain the substance of all the evidence, which, as we have said, is recited chronologically and in unbroken numerical sequence to the final declaration (R. 53):

> "At this point the U. S. Attorney, Mr. Beach, said: 'The Government rests, if it please the court.'"

After we closed, he at once said (R. 56) that the Government "had no further evidence to offer." The opinion below ignores the first statement, but quotes the second. By the certificate (R. 71) the trial court certifies the evidence in this bill to the end "that the questions raised by the foregoing exceptions may be reviewed and determined on appeal." The certificate and bill are senseless and useless and mean nothing if not that all the evidence is here. The opinion below is that this bill "can not be so taken, because it is apparent from the charge of the court that certain letters of the defendant were offered," etc., "and the same are not recited or mentioned in the bill of exceptions."

The cases which we have cited show that the absence of a recital in terms that the bill contains the substance of all of the evidence is not fatal to its being so taken; and we think *Clyatt's* case conclusive of this bill.

As to the receivers' report of Nov. 23, 1903, which was identified (R. 37), it is clear that it was not then put in evidence. Toward the close of the Government's evidence this report is again referred to (R. 45-46), and its counsel then said (R. 45, bottom), "I have not offered it yet." From this point, the bill proceeds with absolute and exclusive regularity to its close. It is impossible for this report to have been put in evidence after this, or at any time, with or without objection and exception, and this bill not show it. Three other similar reports were put in evidence (R. 34-35) over objection and exception, as the bill recites. These reports were utterly inadmissible under section 860 *R. S. U. S.*, if for no other reason, and that of Nov. 23, 1903, was subject to the same objection, and especially so, as the Government's counsel below said of it (*Brief for U. S.*, p. 6) that—

> "it is clear, from an examination of the indictment and a reading of so much of the testimony as appears in the bill, that this account of the receivers of November 23, 1903, was the pivotal fact in the case—was, indeed, the keystone of the whole prosecution."

The bill of exceptions shows that counsel merely neglected to put it in evidence—a not uncommon occurrence. In view of the above statement of counsel, the court below should have reversed this judgment; but that court in its opinion did not even notice the as-

sertion, although it did not specify any particular report in its references (R. 80, 81) to the "reports", and, in all probability, considered the omitted report as in evidence, like many other material facts stated in the opinion, but wholly alien to this record.

As to the alleged letters referred to in the general charge of the trial judge (R. 68-69) and mentioned by counsel, and which the court below gives as its principal reason for rejecting this bill as complete, the letter is twice recited in the bill (R. 53, bottom, and R. 64, bottom), and its substance as recited speaks for itself. It is elementary that the bill controls the charge. In *Gassenheimer* v. *U. S.*, 26 App. D. C. 432, the same trial judge who sat in this case, charged the jury as to personal hostility of impeaching witnesses, but the bill of exceptions recited no evidence of such fact. The court (*per* Shepard, Ch. J.) said (p. 447):

> "It was suggested in the argument, that the cross-examination of the impeaching witnesses developed that they were actuated by personal hostility, and had in fact given their individual opinions rather than those entertained in the community. We find no such evidence in the record, and, as the charge was excepted to properly, we must hold that it was erroneous."

The same point arose in *Clem* v. *State,* 31 Ind. 480, and the court said (p. 481):

> "Then the court in its instructions told the jury that the defendant had, during the progress of the trial, admitted certain important facts, and that the facts thus admitted must be taken as if proved beyond a reasonable doubt. Now, if such admissions were made, they were evidence, and yet a bill of exceptions purporting to contain all the evidence is wholly silent as to such admissions having been made. We must look to the bill of exceptions for the evidence, and (though we may apprehend that there was an oversight in this respect in making it up) we are compelled to hold, as the record stands, that there was no warrant for the statement of the court."

The same principle is expressly recognized in *Waldron* v. *Waldron,* 156 U. S. 361, 382.

In every other respect, except only as to the alleged "letters" (and possibly the report of Nov. 23), the court below treats this bill as regular and complete. It seemed to be conclusive on the accused but not on the Government or the court, for alien matters are assumed to have been put in evidence whenever necessary to support the conviction, though the bill is silent as to them, and shows no room or place where they could have been received. Any other evidence in the case would necessarily have broken or destroyed or altered the present numerical sequence of the exceptions—especially such as it has been said and held below was received.

Without assuming a case as made that was not made, the evidence actually given in this case is wholly insufficient to prove any single one of the essential elements of the offense alleged, let alone the crime in its entirety. We ask nothing more than a comparison of this bill with that in *Clyatt's* case, in order to show that our bill must be taken as complete and conclusive.

XV. THE JUDGMENT.

The judgment (R. 26-27) is subject to grave criticism. We have already noted that the trial court added labor, as to which the statute is silent, and that the court below modified the judgment by striking out this addition (R. 85) as unwarranted (R. 84), and because its rejection is of no practical consequence (R. 84) to the accused and does not necessitate reversal (R. 84). If the unwarranted addition made the judgment void, the court below could not modify it so as to make it valid. *In re Graham,* 138 U. S. 461, this court said (p. 463):

> "It is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted renders the judgment absolutely void."

In *Whitworth* v. *U. S.*, 52 C. C. A. 214, the judgment in embezzlement was reversed because costs were added, and the court said (p. 216):

> "In the national courts a judgment in a criminal case must conform strictly to the Act of Congress which authorizes it. Any departure from the statute in the extent or character of the punishment adjudged constitutes an error which is fatal to the judgment."

The judgment contains no adjudication of guilt or conviction, no statement of the offense or any offense, no mention of any verdict, and no adjudication of innocence or acquittal on the three counts. It could not be pleaded in bar of another prosecution for the same offense without being supplemented by the whole record and all the evidence. *Paley on Convictions* (London, 1904) says (p. 274):

> "The judgment consists of two parts, viz., the adjudication of conviction, and the sentence or award of punishment."

To the same effect: *Gaither* v. *State*, 21 Tex. App. 527, 538. 19 *Ency. P. & P.* 471-483. The caption is no part of the judgment. See *Jackson* v. *Ashton*, 8 Pet. 148, 149. *Harris* v. *Leonhardt*, 2 App. D. C. 318, 320.

Another objection is to that part which leaves it to the Attorney-General to designate the prison. As some prisons require hard labor and others do not, and as federal prisoners in state prisons are subject to the same discipline as state prisoners (*R. S. U. S.* section 5539), this judgment leaves it to the discretion of the Attorney-General to add hard labor in effect to this judgment (R. 84, bottom), though the statute is silent; but it is elementary that neither Congress nor courts can confer judicial powers upon him. *Constitution U. S.*, Art. 3, Sec. 1. *Martin* v. *Hunter*, 1 Wheat. 304, 330. A similar question arose in *Ex. p. McClusky*, 40 Fed. Rep. 71, 73, concerning the right of the Attorney-General to determine the infamous or non-infamous character of the offense by his designation of the prison. It is for Congress alone to declare the punishment of crimes, and for courts to award it.

XVI. CONCLUSION.

We most earnestly submit that the accused has been summarily denied the rights guaranteed him by the Constitution and laws of the land; that he has been most cruelly and unjustly put to con-

viction of an infamous crime without any reasonable chance whatever to defend himself; that his every proper request or objection was invariably met with monotonous denial; and that the judgment should be reversed either on the writ of error or on the writ of certiorari if the former be untenable, and the cause remanded with the directions proper in the premises.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Plaintiff in Error and Petitioner in Certiorari.

HENRY E. DAVIS,
Counsel.
Washington, D. C.
January, 1907.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

THOMAS M. FIELDS,
Plaintiff in Error,
vs.
THE UNITED STATES.

No. 395.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF CASE AND ASSIGNMENT OF ERRORS.

STATEMENT OF CASE.

This case comes up from the court of appeals of the District of Columbia on a writ of error allowed by a Justice of this court, to review a judgment of that court affirming a judgment of the supreme court of the District of Columbia effecting a statutory forfeiture by the plaintiff in error of at least one-half of $10,070.82, and his imprisonment in the penitentiary for five years, for the alleged crime of embezzlement

assumed to have been committed by him as a chancery receiver; but this crime is not properly averred in the indictment, it has not been committed at all, the evidence utterly fails to prove it, and of it the trial court had no jurisdiction whatever.

The plaintiff in error and Andrew A. Lipscomb were jointly indicted as chancery receivers, in the supreme court of the District of Columbia, on a charge of embezzlement. A severance was had, and the former was railroaded to conviction for what it is impossible to say, but several months later the latter was properly tried and promptly acquitted, and therefore his name does not appear in the opinion of the court below. The plaintiff in error was sentenced to be imprisoned and kept at labor in the penitentiary for the period of five years. He appealed to the court of appeals of the District of Columbia, and on May 1, 1906, that court modified the sentence (R. 85) by striking out the words "at labor," and as so modified affirmed it.

This judgment (if valid) carries with it as the direct, immediate, and inexorable effect under the statute, the absolute forfeiture by the accused of all his right and claim to his commissions, costs, and charges on the receivership fund, which (R. 36) commissions, etc., amount to $10,070.82, and which, to the amount of about ten thousand dollars (R. 36), had been adjusted and allowed by the chancery court nearly one year before Congress passed the law upon which this prosecution is based, and nearly two years before the law took effect, and all of which (R. 36) had been so adjusted and allowed long before this indictment was filed. The statute requires a forfeiture by the accused of "all right or claim to any commissions, costs, and charges" on the trust fund, thus including both paid and unpaid commissions, etc., inasmuch as "right" refers to the former and "claim" to the latter.

The defendant in error has filed a motion to dismiss for the want of jurisdiction, together with a special brief in sup-

port thereof; to which the plaintiff in error has filed a special brief in reply. The plaintiff in error has also filed herein his petition that the writ of *certiorari* shall issue if the writ of error shall be found untenable, together with a brief and argument on the merits in support thereof; to which the defendant in error has filed a brief in opposition. Both the motion and petition were duly submitted to the court on January 21, 1907, but on January 28, 1907, they were postponed to the hearing of the case on its merits.

The defendant in error has also filed a motion to advance, in which the plaintiff in error has concurred; and this motion was also submitted to the court on February 4, 1907, and on February 25, 1907, it was granted, and the case was advanced for hearing on Monday, March 11, 1907, after the cases already assigned for that day.

In order to avoid duplication of printing, at the hearing on the merits the plaintiff in error, with the court's approval, and with the consent of opposing counsel, will rely upon and use his aforesaid briefs on the jurisdiction and merits, augmented and completed by the statement of case and assignment of errors herein set forth.

For convenience of reference, uniformity of arrangement, and use to some extent as an analytical index to the aforesaid brief on the merits, which is now preceded by a general subject-index, the errors herein assigned are assembled under the titles and numbers and in the order of the subjects considered in that brief. At the end of each error assigned, reference is given to the brief for the discussion of the point made. Record references are also given where useful, but they will always be found in detail in the pages of the brief.

On March 3, 1901, Congress passed "an act to establish a code of law for the District of Columbia * * * to go into effect and operation from and after the first day of January, in the year of our Lord nineteen hundred and two"—ten months in the future. This code is composed chiefly of old laws carried

forward, but section 841 thereof is entirely new and original legislation. This section is the sole predicate of the instant case, and reads as follows:

> "Sec. 841. EXECUTORS AND OTHER FIDUCIARIES.—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office of employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

The present case relates exclusively to persons and property that had come into possession long before the code was passed or even contemplated; and as to them we contend that the law has no application whatever, because it includes only those that may come into possession in the future—coming property; but nevertheless the judges below hold (R. 77, 78):

> "The fact which may be inferred from the indictment is made certain by the evidence, namely, that the money came into the possession of the receivers prior to the enactment of the code. * * * We are of the opinion that the learned trial justice did not err in holding that Section 841 comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect."

On April 3, 1905, this indictment (R. 1-2) was filed. It was based upon the said section 841, and contained eight

courts, differing only as to ownership. A demurrer (R. 2) was filed on April 20, 1905, and was sustained (R. 4) on April 28, 1905, as to four counts, and overruled as to the others. On April 25, 1905, a severance (R. 4) was had, and on May 8, 1905, the plaintiff in error was summarily put to trial on the remaining four counts. He was convicted on the third count, and acquitted on the others.

We are, therefore, concerned with the third count alone, which reads as follows:

> "THIRD COUNT:
>
> "And the grand jurors aforesaid, upon their oath aforesaid, do further present:
>
> "That on the twenty-third day of November, in the year of our Lord, one thousand, nine hundred and three, and at the District aforesaid, said Andrew A. Lipscomb and said Thomas M. Fields were receivers, that is to say, were receivers under a certain order of the Supreme Court of the District of Columbia, holding an equity court, dated the sixth day of November, in the year of our Lord, one thousand eight hundred and ninety-four, in equity cause number fifteen thousand, nine hundred and seven, and entitled the Washington Beneficial Endowment Association versus the Commercial Alliance Life Insurance Company; that on the said twenty-third day of November, in the year of our Lord, one thousand nine hundred and three, the said Andrew A. Lipscomb and said Thomas M. Fields, as such receivers, had possession of a certain other large sum of money, to-wit, the sum of fifteen thousand, nine hundred and seventy-four dollars and seven cents, which said fifteen thousand, nine hundred and seventy-four dollars and seven cents, in money of the value of fifteen thousand, nine hundred and seventy-four dollars and seven cents, being the property and moneys of the Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them, the said Andrew A. Lipscomb and said Thomas M. Fields, by virtue of their office and employment as such receiv-

ers, and that they, the said Andrew A. Lipscomb and said Thomas M. Fields, so having the said fifteen thousand, nine hundred and seventy-four dollars and seven cents in their possession as aforesaid on the said twenty-third day of November in the year last aforesaid, and at the District aforesaid, and while they were such receivers as aforesaid, did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the same; against the form of the statute in such case made and provided, and against the peace and Government of the said United States."

The demurrer (R. 2-4) assails this count on various grounds, among which are that it is bad in substance in that no offense is charged under said section 841 or any other law; no description is given of the property or any property of which the accused are alleged to have been appointed receivers, nor are any facts alleged showing any connection between the money alleged to have been received by them and the receivership order recited, or that the money was included in the order; the facts and particulars of the receivership are not alleged; there is no direct allegation of ownership; no facts or particulars are alleged showing that the accused have converted or appropriated the money to their own use, but only a mere conclusion to that effect; no facts or particulars are stated showing any fraud of the accused, but only a conclusion to that effect from non-averred facts; neither section 841 nor any other law applies to receivers into whose possession the property or money had come before the code took effect; construed and applied retrospectively to include persons and property that had come into possession before the code took effect on January 1, 1902, section 841 is unconstitutional and void by reason of its forfeiture clause, in that it operates a deprivation of property in previously earned, allowed and adjusted commissions, costs, and charges, without due process of law, it takes private property for public or private use without just

or any compensation, and it arbitrarily divests and confiscates vested property rights. The motion in arrest (R. 19) reiterates these objections and adds some others.

Our objection to the application of section 841 to the instant case was frequently repeated and overruled throughout the trial, and we excepted. We contend that the demurrer to this third count should have been sustained, for the reason stated therein.

On Wednesday, May 3, 1905, under the provisions of the said code, we filed our motion and affidavit (R. 5-6) for a commission to take the depositions of two non-resident witnesses in New York, and for letters rogatory to take the deposition of a non-resident witness in London, England, and gave one day's notice (R. 6) of the hearing of this motion, which, on Thursday, May 4, 1905, was granted (R. 7). Our interrogatories were duly prepared, served, and filed before twelve o'clock noon of Saturday, May 6, 1905 (R. 11), but nevertheless the same judge who passed the order forced us into trial (R. 29) on Monday morning, May 8, 1905, over our earnest protests and pleadings for a little time to execute the order and prepare for trial.

On Thursday, May 4, 1905, we filed our motion and affidavit (R. 9) for an order requiring the district attorney to return to the office of the clerk of the trial court all of the original papers and records in the equity cause 15907, mentioned in the indictment (R. 2), which papers and records he had unlawfully removed from the said office some time before the said indictment was found. Inspection of these public papers by us was a matter of fixed right, and absolutely necessary to enable us to prepare for trial. We noted this motion for hearing on Monday, May 8, 1905, when it was heard and overruled, and we excepted. (R. 17, 28, Ex. 1.)

On Thursday, May 4, 1905, we also filed our motion and affidavit (R. 7-8) for a bill of particulars, and on the same date served a copy of each on the district attorney (R. 8), together

with a notice (R. 8) of hearing on Monday, May 8, 1905, on which date he objected for want of two clear days' notice, and this objection was then sustained, and we excepted (R. 29, Ex. 2), and our motion was thereupon overruled (R. 17).

On Monday, May 8, 1905, we filed our motion and three affidavits (R. 10-16) asking a continuance for a reasonable time, based upon the various reasons therein set forth; but on the same date our motion was overruled and we excepted (R. 17, 29, Ex. 3). We specially called the court's attention (R. 29, Ex. 4) to the order for the commission and letters rogatory, and begged for the short time necessary to execute the same. Our affidavits showed beyond any question that both the accused and his counsel were utterly helpless without a reasonable continuance, but it was refused instantly and in a single word.

The accused was then arraigned (R. 29, 17-18), and pleaded not guilty to the said four counts, and the alleged trial began immediately, and continued as a practically *ex parte* proceeding to its close, as the accused was confronted with the obvious predetermination to railroad him to conviction at any cost, and to give him no chance whatever to defend himself. It was impossible (*Gassenheimer vs. United States,* 24 App. D. C. 312, 313) for the accused to compel the removal of the case for trial before another judge.

We contend that each of the foregoing motions should have been granted, and that the denial is subject to review.

We further contend that the effect of the plea on the pleading and proof was ignored, and that the evidence offered to show the alleged receivership, possession, ownership (including corporate existence), and conversion was inadmissible; and that even if admissible, it was insufficient in law to support the verdict. These questions are raised by various objections and exceptions reserved during the trial.

In connection with the foregoing questions concerning the evidence, we also rely upon various exceptions to errors com-

mitted in the granting of certain prayers and the refusing of others, and in the general charge to the jury.

We also assert that the trial judge, in the presence of the jury, indulged in certain caustic comments which were erroneous, unwarranted, improper, and intensely prejudicial to the accused, in that, among other things, they declared his guilt and certain conviction, and destroyed the effect of his granted prayers, and otherwise seriously and unjustly reflected upon both the accused and his counsel; to which comments we duly excepted.

We further contend that in the absence of any testimony concerning his character, a legal presumption of good character existed in favor of the accused, and that his request for an instruction to the jury on this subject should have been granted; but it was refused and exception was duly noted.

We also insist that the then district attorney and his then assistant committed repeated and flagrant breaches of their professional and official duties in their arguments to the jury, and in certain statements made to the court in the presence of the panel of jurors; to which misconduct we duly reserved exceptions.

Before and during the alleged trial, but always in the presence of the panel of jurors and with the approval of the trial judge, the then prosecutors falsely and deliberately charged the accused with various crimes and offenses and odious acts other than that alleged in this indictment; and under this pleading averring the conversion of one certain sum of money on one certain date, they were permitted, without any statute so providing, to present in evidence (R. 38-41) no less than ninety-two separate and distinct acts, items or transactions, without any election whatever, each claimed to be in itself a substantive offense of embezzlement, forty-three of which preceded the code and the statute of limitations, sixty-one of which were private checks which were not money, and sixteen of which were private certificates of deposit which

were not money; all of which ninety-two items the trial court sent to the jury with the charge (R. 69-70) that they would be justified in finding the accused guilty of all of them if they should find (from no evidence whatever) that he had conceived a plan to embezzle the fund systematically, but if they should not find such a plan, then they should select some single item and convict of that, taking into consideration, however, on the question of intent, all of the other items. The presumed plan seems to have been the *corpus delicti;* but the case was so conducted—or, rather, misconducted—that it is utterly impossible to designate the real *corpus delicti*—if any there were—or to tell of what the accused has been convicted.

We contend also that the bill of exceptions is complete and conclusive, and must be taken so to be, and to contain the substance of all of the evidence offered by the prosecution, notwithstanding there is no affirmative recital to that effect.

Throughout the bill appear the initials "D. T. W.," being those of the trial judge, made by him to designate the changes which he effected after the bill had been formally agreed on by the respective parties and submitted to him for his signature. These changes relate chiefly to his own rulings, and in some instances render the bill contradictory in its recitals, in others greatly confuse it, and in still others destroy the exceptions noted by leaving the objections without any of the reasons upon which they were based.

We claim, further, that the judgment is bad on its face.

For a more complete and detailed statement of the case and the various questions presented by the record, we respectfully refer to our petition for the writ of *certiorari,* which we have already mentioned. These questions are fully discussed in our brief on the merits, in which we try to show that in this case neither of the courts below is impeccable, but each constantly impinges on the Constitution, the acts of Congress, and the elementary rules of law, language and logic, in order to convict and destroy the accused. The maxim, "*Ignorantia*

juris quod quisque scire tenetur, neminem excusat," applies to the judge and prosecutor as much as to the accused. *Ignorantia judicis est calamitas innocentis.*

We shall pretermit, in the oral argument, various errors assigned, leaving their discussion to our briefs, but without in any manner waiving the benefit of them.

At this point we shall take the liberty to note that although certain orders and decrees in the equity cause 15907, referred to in the indictment, were vital to the prosecution's case, yet no evidence whatever was offered to show that the chancery court had ever acquired jurisdiction in any way over the Commercial Alliance Life Insurance Company, the sole defendant to that suit; and since that record affirmatively showed that the said Company was a non-resident corporation, without an office or agent in this District, and the said suit, orders and decrees were *in personam* and not *in rem*, the presumption of law was and is against jurisdiction of the corporation in such a case. (Record 30, Bill in Eq. 15907. Record 35, Report of Auditor. Record 44-45, Deed.) To enable the prosecution to avail itself of the said orders and decrees, affirmative proof of jurisdiction over the Company was essential. *Galpin vs. Page*, 18 Wall. 350, 366. Even if such jurisdiction had been shown, another difficulty appears in that the record recites (R. 53, bottom) that "all of the orders and decrees passed in said Equity Cause No. 15907, and consolidated causes, were recorded finally and at length in the minutes of the court the same day they were passed"; yet in no instance was the judicial record or minutes offered to prove any of them, but the prosecution merely produced a witness, who was a file clerk in the trial court (R. 30), to whom certain papers were shown, which he identified as found in a box in the district attorney's office; but he did not testify that they were in fact either genuine or original papers, nor was there any proof that they were such. The witness, in every instance, merely stated what the various papers shown to and identified by him purported to be. The

mere production of a paper "purporting" to be this or that, did not prove it to be either original or genuine. No foundation whatever was laid for secondary evidence of the said orders and decrees. The judicial record was at hand, and by it alone could they be proved, for the original papers were not the legal evidence to establish what the record contained. 17 *Cyc.* 303. 24 *Am. & Eng. Encyc. Law* 200. *Duncan vs. Freeman,* 109 Ala. 185, 189. 24 *Am & Eng. Encyc. Law* 190. Exceptions were duly reserved to all of the alleged orders and decrees which were put in evidence, but it will probably be claimed by the opposing counsel that this particular ground was not stated in our objections. The want of proof of the jurisdiction of the chancery court is clearly open on review, and our prayers for a verdict on all of the evidence in the case search the whole record for any omission to prove any essential fact by legal evidence thereof.

ASSIGNMENT OF ERRORS.

The court of appeals of the District of Columbia erred in the following respects:

I. Trial Court Had No Jurisdiction.

The court erred in holding (R. 77-78) that the trial court had jurisdiction of this case upon the false theory that section 841 of the code of law of the District of Columbia—

> "comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect." (Brief, pp. 1-64. Record 2-4, Demurrer. R. 19, Motion in Arrest. Record 59, Exception 34, Motion for Verdict. R. 59, Ex. 38, Prayer VI. R. 31-32, Ex. 5. R. 32, Exs. 6-9. R. 34, Ex. 10. R. 34-35, Ex. 11. R. 38, Ex. 11A. R. 40, Ex. 13. R. 41, Ex. 14.)

II. Commission and Letters Rogatory.

The court erred in holding (R. 78-80) that the accused was not entitled to any time whatever to execute the order (R. 7) for the commission and letters rogatory, the said order having been passed on Thursday, May 4, 1905, and the trial having been held on Monday, May 8, 1905. (Brief, pp. 64-71.)

III. Inspection of Papers in Eq. 15907.

The court erred in holding (R. 78) that the accused was not entitled to an order for inspection of public papers requiring the prosecutor to return to the office of the clerk of the trial court all of the original papers and records in Equity Cause No. 15907, mentioned (R. 2) in the indictment, which papers and records he had unlawfully removed therefrom some time prior to the filing of the indictment; inasmuch as (1) their free inspection was absolutely necessary to enable the accused and his counsel to prepare for trial, and (2) the trial court of its own motion ruled (R. 42, top) that—

> "it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence." (Brief, pp. 71-75.)

IV. Bill of Particulars.

The court erred in holding (R. 77) that the accused was not entitled to a bill of particulars. (Brief, pp. 76-83.)

V. Continuance.

The court erred in holding (R. 78-80) that the accused was not entitled to a continuance in order that he and his counsel might have the time absolutely necessary to enable them to prepare for trial. (Brief, pp. 83-92.)

VI. Effect of Plea.

The court erred in ignoring the effect of the accused's plea on the pleading and proof. (Brief, pp. 93, 97.)

VII. The Receivership.

The court also erred in holding—

(*a*) That (R. 76) the allegations of the indictment (R. 1-2) as to the receivership are sufficient. (Brief, pp. 93-95. R. 3, Demurrer. R. 19, Motion in Arrest.)

(*b*) That (R. 80, 81, 82) the evidence is sufficient to show that the accused was a receiver as alleged. (Brief, pp. 95-99. R. 21, Motion, paragraphs 8 and 9. R. 31-32, Ex. 5, Receivership Order. R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV.)

(*c*) That (R. 80, 81, 82) the several reports of the accused in equity cause 15907 were competent evidence as admissions to prove the alleged receivership. (Brief, p. 174. *See Error X (t) infra.*)

(*d*) That (R. 80, 81, 82) there was no error of the trial court in peremptorily charging the jury (R. 66, bottom) as follows:

> "You may take it as a matter settled by the proceedings of that court that the defendant was a receiver as charged in this indictment." (Brief, pp. 97-99, 174. R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV. R. 31-32, Ex. 5, Receivership Order. R. 21, Motion, paragraphs 8 and 9. *See Error X (t) infra.*)

VIII. The Possession.

The court also erred in holding—

(*a*) That (R. 76) the allegations of the indictment (R. 2) as to the possession as "such receivers," are suffi-

cient. (Brief, pp. 99-100. R. 3, Demurrer. R. 19, Motion in Arrest.)

(*b*) That (R. 80, 81, 82) the evidence is sufficient to show possession as "such receivers" as alleged. (Brief, pp. 100, 174. *See Error X* (*t*) *infra.* R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV. R. 21, Motion, paragraphs 8 and 9.)

IX. The Ownership.

The court also erred in holding—

(*a*) That (R. 76) the allegations of the indictment (R. 2) as to the ownership are sufficient. (Brief, pp. 100-101.)

(*b*) That (R. 80) the evidence is sufficient to prove the ownership as alleged. (Brief, pp. 101-117.)

(*c*) That (R. 80) the accused was not a joint owner of the fund. (Brief, pp. 100, 114.)

(*d*) That (R. 80) there was no error of the trial court in overruling (R. 59, Ex. 34) the accused's motion for a verdict of not guilty on all of the evidence in the case—

> "because the evidence fails to show ownership as alleged in * * * the indictment, either at the time alleged therein, or at any time within three years next before the filing thereof." (Brief, pp. 114, 130.)

(*e*) That (R. 80-81) the evidence is sufficient to show that the alleged owner was "*a body corporate,*" as averred (R. 2) in the indictment. (Brief. pp. 117-133.)

(*f*) That (R. 80) there was no error of the trial court in admitting (R. 42, Ex. 15) in evidence Liber No. 1, Acts of Incorporation; inasmuch as (1) it was wholly irrelevant to any issue in the case, and (2) the trial court had just ruled (R. 42, top) a like record inadmissible. (Brief, p. 130.)

(*g*) That (R. 80) there was no error of the trial court in receiving (R. 42, Ex. 16) the testimony of the witness Schayer. (Brief, p. 121.)

(*h*) That (R. 80) there was no error of the trial court in permitting (R. 44, Ex. 17) the witness Donaldson to testify as to "when the said Association was incorporated"; inasmuch as parol testimony was inadmissible to prove that fact. (Brief, p. 119.)

(*i*) That (R. 80) there was no error of the trial court in admitting (R. 43, Ex. 16) as secondary evidence Liber No. 2, Acts of Incorporation, to prove the alleged certificate of incorporation of the said Association; inasmuch as (1) it was ruled (R. 42) inadmissible as primary evidence, (2) no foundation whatever was laid (R. 42-43) for its introduction as secondary evidence, and (3) the trial court had just sustained (R. 42, top) an objection to and had ruled out *this very record* on the ground (stated by the trial judge himself) that—

> "it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence." (Brief, pp. 120-123.)

(*j*) That (R. 80) there was no error of the trial court in overruling (R. 54, Ex. 28) the accused's motion to strike out all of the secondary evidence tending to prove the alleged certificate of incorporation. (Brief, pp. 120-123.)

(*k*) That (R. 80) there was no error of the trial court in charging the jury (R. 67-68) as follows:

> "Inasmuch as corporations are only created through the manner provided by the law, which involves the issuance of a certain certificate or charter which determines their existence, *if that or a copy of it can be produced*, that is sufficient to determine the question of the existence of such corporate body at that time.
>
> "There is evidence before you which tends to show

that at a certain time a certificate, according to the requirements of the law, was filed in the Recorder's office, but that it has been destroyed. If you find from all the evidence which has been submitted upon that point, including testimony concerning the identification of the record which was read, that *a paper of which that record is a copy was filed* in the Recorder's office at the time indicated by that record, then that would justify you in assuming that the corporation has been duly organized and created. If you are not satisfied beyond a reasonable doubt from the evidence that such a paper was filed, you may inquire whether or not as a matter of fact in the commercial world an organization of this name was representing itself as a corporation, and as such was doing business under the management of such officers as are required in corporate enterprises, that is to say, a president, the secretary, and the like; and if you find from the evidence beyond a reasonable doubt upon that point, that is that the Association was doing business in this District as a corporation and representing itself to be a corporation, *that is sufficient* to justify you in finding for the purposes of this inquiry that it was a corporation.

"If you find that it was a corporation, * * * that the corporation ever was in existence, * * * then it is utterly immaterial whether that corporation was continuing to do business, or continuing to exercise the function of a corporation, *so long as it never was formally dissolved by judicial proceedings,* concerning which there is no proof." (Brief, pp. 117-133, 99. This part of the charge is covered by Exception 34, Record 59. R. 42, Ex. 15. R. 43, Ex. 16. R. 44, Ex. 17. R. 54, Ex. 28. R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV.)

(l) That (R. 80-81) there was no error of the trial court in refusing (R. 62, Pr. XVII, Ex. 40) the following prayer:

"The jury are instructed that the law presumes the defendant to be innocent of the charge against him,

and that this presumption continues all through the case and until and unless he be proved guilty beyond a reasonable doubt. This presumption of innocence is stronger than and overcomes any presumption of the continuance of the life or existence of any person or corporation named in the indictment, and also any presumption of the continuance of the ownership of the moneys mentioned in the indictment, even if they may believe that at some time prior to the alleged offense, some certain person or corporation named in the indictment was in existence and was then the owner of such moneys." (Brief, p. 130.)

X. The Conversion.

The court also erred in holding—

(*a*) That (R. 76-77) the general allegations of the indictment (R. 2) as to the supposed fraudulent conversion are sufficient, and that it is unnecessary to aver any facts or particulars thereof. (Brief, pp. 133-148.)

(*b*) That (R. 76-77) it is not—

"necessary to allege the particular manner in which the defendant unlawfully and fraudulently converted the money and appropriated the same to his own use. These words have a well known signification, common as well as legal, and are of common use in indictments for larceny and embezzlement." (Brief, pp. 133-147, 148.)

(*c*) That (R. 76-77) there was no error of the trial court in charging the jury (R. 68) as follows:

"With respect to the meaning of the phraseology 'convert or appropriate the same to his own use,' it is plain enough. It needs no further definition." (Brief, pp. 133-139, 148. R. 3, Demurrer, par. *g*.)

(*d*) That (R. 82-83) the supposed evidence of the al-

leged fraudulent conversion is "sufficient to support the verdict." (Brief, pp. 149-178.)

(*e*) That (R. 82-83) from the facts related (R. 54-55) by the accused's own witness Mead concerning the delivery of a single item of $1,000 by the accused to Lipscomb, "there being no single circumstance to show that it [such delivery] was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful, *but also a fraudulent conversion of so much of the fund*"; inasmuch as (1) the trial court ruled (R. 56) in the jury's presence that Mead's testimony showed "*an absolute defense to that item,*" (2) the burden of proof was not lawfully upon the accused, (3) the facts related did not show a wrongful or fraudulent or any conversion to his own use of that sum, and (4) there was no proof of any improper purpose or of any purpose for which the accused delivered the $1,000 to Lipscomb. (Brief, pp. 175-176, 163, 157, 90-91, 92.)

(*f*) That (R. 82-83) there was no error of the trial court in refusing (R. 63, Ex. 45, Pr. XXVII) to instruct the jury as follows:

> "If the jury believes from the evidence that any parts of the sum of money mentioned in the indictment were delivered by the defendant Fields to his co-receiver Lipscomb, then they are instructed, as matter of law, that as to that money so delivered the defendant Fields is not guilty of embezzlement." (Brief, pp. 157, 158, 175, 90-91, 92. R. 54-56, where the trial court ruled (R. 56) the principle of this prayer "*an absolute defense.*")

(*g*) That (R. 82) the evidence shows that the money "was withdrawn through a series of checks cashed at the counter generally by defendant"; inasmuch as the evidence (R. 39) shows that no checks whatever were cashed at the counter or elsewhere by the accused, with but one (R. 54) exception. (Brief, pp. 150-153, 154-155, 176.)

(*h*) That (R. 82) the evidence shows that "when the final order of the tribunal was made there was nothing paid to the parties declared entitled to the same"; inasmuch as the evidence (R. 53, Testimony of Robinson and Padgett) does not so show. (Brief, pp. 153, 156, 162-163, 102, 114, 116, 132.)

(*i*) That (R. 82) the evidence shows that the money was withdrawn from the Trust Co. and "was removed into other banks without an order to that effect, and deposited in the names of the two receivers as individuals"; inasmuch as there is no such evidence in the record. (Brief, pp. 150-153, 176.)

(*j*) That (R. 82) there was no error of the trial court in receiving (R. 38-41) in evidence *without election no less than ninety-two separate and distinct items, acts, or transactions, each as in itself a substantive offense* of embezzlement, and overruling (R. 41, Ex. 14) the accused's objection to such evidence—

> "because the indictment alleges but one offense, and the Government should not be permitted to prove any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day." (Brief, pp. 149, 165-173, 80-82. Record 21, Motion, par. 10.)

(*k*) That (R. 82) there was no error of the trial court in charging the jury (R. 69-70) as follows:

> "Inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, [each of] which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in dealing with those various items.
>
> "If you find from the evidence that after January 1st, 1902, the defendant conceived *a plan* to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived

plan, then *you would be justified in finding him guilty concerning all the embezzlements that you find the proof makes out;* but if you find there was not such a plan preconceived by him before the first embezzlement, and conclude from the evidence that each conversion by him * * * was in itself distinct from every other * * * then you would only be justified in that state of affairs *in finding him guilty upon one single conversion, concerning which all of you must agree.*" (Brief, pp. 149, 172, 173, 165-171, 80-81. This part of the charge is covered by Exception 14, Record 41. Brief, pp. 166, 99. Record 21, Motion, par. 10. The error is also fundamental, and hence requires no exception. Brief, p. 98. *Thornley vs. State,* 36 Tex. Cr. Rep. 119, 124. *Edelhoff vs. State,* 5 Wyo. 19, 27, 28. *Martin vs. State,* 36 Tex. Cr. Rep. 125, 127.)

(*l*) That (R. 82) there was no error of the trial court in refusing (R. 41, Ex. 14. R. 58, Ex. 32. R. 69-70) to require the Government to prove that the accused had fraudulently converted *some particular sum* to his own use. (Brief, pp. 164-165, 80-81, 165-173. R. 21, Motion, par. 10. R. 22, Motion, par. 11.)

(*m*) That (R. 82) there was no error of the trial court in granting (R. 58, Ex. 32) the following prayer:

"The jury are instructed as a matter of law that the Government is not required to prove that the exact sum of money mentioned in the indictment was fraudulently converted or appropriated by the defendant to his own use or that such fraudulent conversion or appropriation occurred at the exact date mentioned in the indictment; it is sufficient if *any part* of such sum was so fraudulently appropriated or converted at any time within three years next before the filing of the indictment." (Brief, pp. 149, 157, 165-173, 80-81.)

(*n*) That (R. 82) there was no error of the trial court in admitting (R. 38-39, 40, Ex. 13) in evidence as separate

and substantive offenses, and without election, sixty-one private checks and sixteen time certificates of deposit as proof of the alleged embezzlement of money (*sic*) averred (R. 2) in the indictment. (Brief, p. 164. R. 22, Motion, par. 12.)

(*o*) That (R. 82) there was no error of the trial court in admitting (R. 38-39, 40, Ex. 13) in evidence, as separate and substantive offenses, and without election, fourteen time certificates of deposit and seventeen checks and twelve withdrawals which preceded (R. 39) both the code and the statute of limitations. (Brief, pp. 177, 82. R. 22, Motion, par. 13 *ad finem.*)

(*p*) That (R. 82) there was no error of the trial court in admitting (R. 39, Ex. 12. R. 40, Ex. 13) in evidence the several deposit slips relating to the accused's accounts in the Trust Company; inasmuch as the Government (R. 39) proved each of said slips "to be in the handwriting of some certain clerk in said Trust Company," and there was no evidence to show that the accused either authorized them or knew anything about them. (Brief, p. 165.)

(*q*) That (R. 82) the evidence shows that "pending inquiry the defendant absconded"; inasmuch as there is no evidence so showing. (Brief, pp. 153, 156, 157-161.)

(*r*) That (R. 82) there was no error of the trial court in granting the following prayer:

> "As bearing upon the question of the defendant's guilt or innocence, the jury may and should consider the evidence in the case which tends to prove that the defendant was a fugitive from justice, and if it finds from the evidence that he did flee from justice that fact, if found to be a fact, while not conclusive evidence of guilt, may, unless explained by something in the testimony, or other facts of the case, be accepted by the jury as circumstances, tending to prove that he regarded himself as guilty." (Brief, pp. 157-158. R. 57-58, Ex. 31.)

(*s*) That (R. 82) there was no error of the trial court in refusing the following prayer:

> "The jury are instructed that the mere fact that the defendant was absent from the District of Columbia when arrested, does not raise any presumption of itself, even though unexplained, that such absence was on account of the charge in this case; and further, that even if they fully believe that such absence was on account of such charge, it does not of itself create any presumption whatever of the defendant's guilt." (Brief, p. 158. R. 63, Ex. 43, Pr. XXII.)

(*t*) That (R. 80, 81, 82) there was no error of the trial court in admitting (R. 32, Ex. 7. R. 34, Ex. 10. R. 34-35, Ex. 11. R. 49-50, Ex. 28. R. 51-52) in evidence in this cause the pleadings of the accused as a party, and the discovery and evidence obtained from him as a party and a witness, in the judicial proceedings known as Equity Causes Nos. 15907 and 16072; inasmuch as the same are inadmissible under the general rules of evidence, and especially as *section 860 R. S. U. S.* destroys the power and jurisdiction of the court to allow the same "to be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture," and makes it essential for the Government to prove its case otherwise, and the same are not made competent evidence by the mere failure of the accused to object specifically on the ground of the provisions of said *section 860 R. S. U. S.*, but even if so, this court may consider the same as plain errors. (Brief, pp. 174, 98-99.)

XI. Improper Comments of Trial Judge.

The court also erred in holding (R. 81-82) that there was no error of the trial court in making the following comments and rulings (R. 57, 58-59, Ex. 33) in the presence of the jury:

"Thereupon the Government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the court would see from the drafts of the prayers handed up. The court then took a recess. After recess the following occurred: *The Court:* Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The court has examined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. *Mr. Baker:* We note an exception to the refusal of each prayer. We note an exception separately to the refusal of each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer. *The Court:* I overrule them. They are put together as a series, and as a series are refused. *Mr. Baker:* Then I offer Prayer No. 1. But I suppose the Government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.

"Thereupon the said prayers were handed to the clerk, and filed in open court, endorsed by the court as follows: 'This series of instructions is refused as a series and ex. *Wright.*'

* * * * * * * *

"Thereupon the following occurred:

"*The Court:* I should perhaps make it clear right here and now, that it is a question which ought to be settled whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from 27 instructions up to an indefinite number. Some 27 prayers have been submitted here *in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial, but to save some possible point for reversal in another court.* I started

to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. *Mr. Baker:* If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having—— *The Court:* You will not state that, either. What I say controls that. *Mr. Baker:* Then I note an exception to the court's ruling, and I ask to offer these prayers separately. *The Court:* I will not permit them to be offered separately in the form in which they are. *Mr. Baker:* Then I note an exception to the ruling of the court." (Brief, pp. 178-182. See also R. 29, and Brief, pp. 75-76, as to the unwarranted insinuations of the trial judge against the accused and his counsel concerning the loss of papers from the court files.)

XII. Good Character.

The court also erred in holding (R. 83)—

(*a*) That there was no error of the trial court in refusing the following prayer:

> "The jury are instructed in this case that the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in their consideration of the evidence." (Brief, pp. 182-190. R. 63, Ex. 44, Pr. XXV.)

(*b*) That the accused was not entitled to any instruction whatever on the subject of the presumption of his good character, because he "offered no evidence of good character." (Brief, pp. 182-190.)

XIII. Misconduct of Prosecutors.

The court also erred in holding (R. 83-84) that there was no error of the trial court in permitting the prosecutors, in their baseless arguments to the jury,—

(*a*) To charge the accused with (1) being "a common thief," (2) depositing these trust funds to his private bank account, (3) "forgery," (4) "treating people as a physician," (5) "trying to break into" the medical profession, (6) maltreating his clients as a lawyer, (7) stealing dead men's money from widows and wards, (8) posing under an assumed name, (9) being a fugitive from justice, (10) not even trying "to prove a good reputation," (11) being a lawyer, and (12)—

> "You have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense." (Brief, pp. 190-201. R. 63-65, Exs. 47, 48, 49, 51, 52, 54. R. 21, Motion, par. 7.)

(*b*) To show to the jury and have them examine the ruled out (R. 41, top) endorsements on the checks on account No. 35191, and to comment thereon. (Brief, pp. 191 (top), 196-197. R. 64, Ex. 50. See also R. 17, 28, 78, and Brief, pp. 74-75, as to the prosecutor's false insinuations against the accused and his counsel respecting the loss of papers from the court files.)

XIV. Bill of Exceptions.

The court also erred in holding (R. 82) that the bill of exceptions (R. 28-71) can not be taken to contain the substance of all of the evidence offered by the Government, in the absence of an affirmative recital to that effect. (Brief, pp. 201-207.)

XV. The Judgment.

The court also erred in holding (R. 84-85) valid the alleged judgment (R. 26-27), either before or after (R. 85) its modification. (Brief, pp. 207-208.)

XVI. Conclusion.

The court also erred in holding that there was no error of the trial court—

(*a*) In refusing (R. 62, Ex. 42, Pr. XX) the following prayer:

> "The jury are instructed that upon the evidence in this case they *may* find the defendant not guilty on the two [third and sixth] counts of the indictment, and they *must* find him not guilty on at least one of the counts." (Brief, pp. 180, 181.)

(*b*) In refusing (R. 59, Ex. 35, Pr. I) the following prayer:

> "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty." (Brief, pp. 97, 114, 130, 173.)

(*c*) In refusing (R. 59, Ex. 36, Pr. IV) the following prayer:

> "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the third count of the indictment." (Brief, pp. 97, 107, 114, 130, 173.)

(*d*) The court also erred in assuming as facts certain material matters not in this record nor in existence, and certain others in direct conflict with the record, and in ignoring and misconceiving and misreciting certain facts shown by the record, especially in those parts of its opin-

ion relating to inspection of papers, continuance, ownership, corporate existence, conversion and arguments of the prosecutors.

(*e*) The court also erred in ignoring many of the exceptions reserved and errors assigned, and in deciding this case without regard to the theories of the prosecutors and the trial judge, and the rulings of the trial court on the proof and prayers and in its charge to the jury, but in some respects in direct conflict therewith, especially as to the effect of the annulment decree on ownership, and the effect of the witness Mead's testimony on conversion.

(*f*) The court also erred in affirming the judgment of the supreme court of the District of Columbia; inasmuch as it should have reversed the same.

(*g*) The court also erred in other respects apparent of record.

At this point we shall pass to our aforesaid briefs on the the jurisdiction and merits.

Respectfully submitted.

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